

CASE NO. 24-7532

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Appellee,

vs.

PORT OF OAKLAND,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
The Honorable Thomas S. Hixson, United States Magistrate Judge
Case No. 3:24-cv-02311-TSH

EXCERPTS OF RECORD VOLUME 2 of 7

Mary C. Richardson (Bar No. 208586)
Kimberly I. McIntyre (Bar No. 184648)
PORT OF OAKLAND
530 Water Street
Oakland, California 94607
Tel: (510) 627-1572 / (510) 627-1205

Eugene M. Pak (Bar No. 168699)
Angela Han (Bar No. 317137)
FENNEMORE LLP

1111 Broadway, 24th Floor
Oakland, California 94607
Tel: (510) 834-6600 / Fax: (510) 834-1928

Stephen C. Willey (Bar No. 209164)
Brandi B. Balanda (*Pro Hac Vice*)
FENNEMORE CRAIG, P.C.
1425 Fourth Avenue, Suite 800
Seattle, WA 98101-2272
Tel: (206) 749-0500 / Fax: (206) 749-0600

Timothy J. Berg
FENNEMORE CRAIG, P.C.
2394 E. Camelback Road, Suite 600
Phoenix, AZ 85016
Tel: (602) 916-5000 / Fax: (602) 916-5999

Therese Shanks
FENNEMORE LLP
7800 Rancharrah Parkway
Reno, NV 89511
Tel: (775) 788-2200 / Fax: (775) 786-1177

Attorneys for Defendant-Appellant Port of Oakland

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3 Before The Honorable Thomas S. Hixson, Magistrate Judge

4
5 CITY AND COUNTY OF SAN)
6 FRANCISCO,)

7 Plaintiff,)

8 vs.)

No. C 24-02311-TSH

9 CITY OF OAKLAND,)

10 Defendant.)

11 San Francisco, California
12 Thursday, November 7, 2024

13 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
14 RECORDING 1:12 - 2:54 = 102 MINUTES

15 APPEARANCES:

16 For Plaintiff:

17 Cooley LLP
18 1333 Second Street
19 Suite 400
20 Santa Monica, California
21 90401
22 (310) 883-6400

23 BY: BOBBY A. GHAJAR, ESQ.

24
25 (APPEARANCES CONTINUED ON NEXT PAGE)

1 APPEARANCES (cont'd.)

2 For Plaintiff:

3 Office of the City Attorney
4 City Hall
5 One Dr. Carlton B. Goodlett
6 Place
7 San Francisco, California
8 94102
9 (415) 554-4700

10 BY: YVONNE R. MERE, ESQ.

11 BY: JULIE VEIT, ESQ.

12 BY: CHRISTOPHER STUART, ESQ.

13 Cooley LLP
14 3175 Hanover Street
15 Palo Alto, California 94304
16 (650) 843-5000

17 BY: JUDD D. LAUTER, ESQ.

18 Cooley LLP
19 Three Embarcadero Center
20 Twentieth Floor
21 San Francisco, California
22 94111
23 (415) 693-2000

24 BY: RYAN C. STEVENS, ESQ.

25 For Defendant:

Fennemore Craig, P.C.
1425 Fourth Avenue
Suite 800
Seattle, Washington 98101
(206) 749-0500

BY: BRANDI B. BALANDA, ESQ.

BY: STEPHEN C. WILLEY, ESQ.

Fennemore Wendel
1111 Broadway
Twenty-Fourth
Oakland, California 94607
(510) 834-6600

BY: EUGENE M. PAK, ESQ.

(APPEARANCES CONTINUED ON NEXT PAGE)

1 APPEARANCES: (cont'd.)

2 For Defendant:

3 Port of Oakland
4 530 Water Street
5 Oakland, California 94607
6 (510) 627-1572

7 BY: KIMBERLY I. MCINTYRE, ESQ.

8 Oakland City Attorney's
9 Office
10 One Frank H. Ogawa Plaza
11 Sixty Floor
12 Oakland, California 94612
13 (510) 238-4483

14 BY: CHRISTINA LUM, ESQ.

15 Transcribed by:

16 Echo Reporting, Inc.
17 Contracted Court Reporter/
18 Transcriber
19 echoreporting@yahoo.com

1 Thursday, November 7, 2024

1:12 p.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: All right. Good afternoon, everyone.

5 We are here in Civil Action 24-2311, City and County of San

6 Francisco versus the City of Oakland, the Honorable Thomas

7 S. Hixson presiding.

8 Counsel, just pull your microphones towards you, and

9 let's state your appearances. Let's start with Plaintiff's

10 counsel.

11 MR. GHAJAR: Thank you, your Honor. Good

12 afternoon. Bobby Ghajar from Cooley on behalf of the City

13 and County of San Francisco. I have with me Yvonne Mere --

14 she's Deputy City Attorney for the City and County of San

15 Francisco -- in the audience, along with Christopher Stuart,

16 who's a Deputy City Attorney for the City and County of San

17 Francisco.

18 THE COURT: Good afternoon.

19 MS. VEIT: Hi. Julie Veit, Airport General

20 Counsel with the City and County of San Francisco.

21 THE COURT: Good afternoon.

22 MS. VEIT: Good afternoon.

23 MR. LAUTER: Judd Lauter, attorney at Cooley LLP,

24 also for the City and County of San Francisco.

25 THE COURT: Good afternoon.

1 MR. STEVENS: Good afternoon, your Honor. Ryan
2 Stevens from Cooley, also on behalf of the city and county
3 of San Francisco.

4 THE COURT: Good afternoon.

5 MS. BALANDA: Good afternoon, your Honor. Brandi
6 Balanda of Fennemore for the Port of Oakland.

7 THE COURT: Good afternoon.

8 MR. WILLEY: Good afternoon, your Honor. Stephen
9 Willey of Fennemore, also for the Port of Oakland.

10 THE COURT: Good afternoon.

11 MR. PAK: Eugene Pak from Fennemore for the Port
12 of Oakland.

13 THE COURT: Good afternoon.

14 MS. MCINTYRE: Good afternoon, your Honor.
15 Kimberly McIntyre, Deputy Port Attorney, on behalf of the
16 Port of Oakland.

17 THE COURT: Good afternoon.

18 MS. LUM: Good afternoon, your Honor. Christina
19 Lum for the City of Oakland.

20 THE COURT: Good afternoon.

21 So I've issued an order allocating time for argument on
22 each subject and between the parties, so first up is the
23 moving party, San Francisco, to discuss the merits of the
24 preliminary injunction motion, and I will leave it up to
25 counsel to decide if you would prefer to speak at the podium

1 or if you prefer to stay at the counsel table. It's
2 entirely up to you. Whichever option you choose, please
3 make sure you're talking into a microphone.

4 MR. GHAJAR: Your Honor, may I use this lectern?

5 THE COURT: Yes.

6 MR. GHAJAR: Thank you for your Honor's order. I
7 think it made arranging for today's argument easier. I'm
8 going to argue on behalf of the City and County of San
9 Francisco. I'm going to refer to the City and County of San
10 Francisco as "San Francisco" for purposes of today's
11 argument.

12 I plan to handle the merits of the preliminary
13 injunction motion with assistance from Jeff Lauter. My
14 colleague Ryan Stevens will handle the argument relating to
15 the City of Oakland's position that it is not a proper
16 party.

17 Oakland knows better. We would not be here today if
18 Oakland had exercised some discretion, hired a trademark
19 attorney to conduct proper trademark clearance, and
20 respected San Francisco's longstanding trademark rights. We
21 would not be here today if Oakland heeded warnings from its
22 residents, who were not only proud of their airport, and the
23 fact that it prominently bore Oakland's name, but point out
24 the obvious, "If you adopt 'San Francisco Bay Oakland
25 International Airport,' it will cause confusion."

1 We wouldn't be here today if Oakland had listened to
2 experts from the airline industry who wrote letters to
3 Oakland imploring it not to adopt the new name, and pointed
4 out the obvious, "If you change your name, it's going to
5 cause confusion," or if Oakland had listened to San
6 Francisco, which, upon learning of the new name, asked
7 Oakland to refrain from the name change over concerns of
8 confusion and over concerns about trampling San Francisco's
9 rights.

10 It was a bad idea for everyone, everyone but those who
11 run the Oakland Airport. For those, they saw an
12 opportunity. Their declarations, which I'll address later
13 today, talk about a need to change the name to highlight
14 Oakland Airport's proximity to San Francisco.

15 Respectfully, we all know, Oakland knows, how to tell
16 people where Oakland is, but Oakland didn't choose to run a
17 campaign educating people across the United States that
18 Oakland, California, is, quote, "located in the San
19 Francisco Bay," or, quote, "near the city of San Francisco,"
20 or "proximate to the San Francisco Bay."

21 They didn't need the new infringing trademark, and
22 their declarations don't establish that. Instead, this is
23 about what certain decision makers at Oakland wanted. It
24 adopted a new brand and identity that is dangerously and
25 confusingly similar to San Francisco's.

1 THE COURT: Counsel, when I think about this
2 motion, it's helpful to me to think in terms of particular
3 theories of confusion that are recognized under statute and
4 case law, and in looking through San Francisco's papers, I
5 see three of them. One is affiliation, another is initial
6 interest confusion, and another is point of sale confusion.
7 Do you believe there are additional particular theories of
8 confusion that you've advanced?

9 MR. GHAJAR: I think those three are the primary
10 theories, and, as your Honor likely knows, we only need to
11 prevail on one of them to establish trademark infringement.

12 I would add to that that the confusion that we're
13 seeing goes both ways. Because of the name change, as your
14 Honor saw in our declarations, travelers are showing up at
15 San Francisco International Airport intending to go to San
16 Francisco Bay Airport. So that is a little bit unusual.
17 You don't see that in a traditional trademark infringement
18 case. So it is an offshoot of those arguments.

19 I'd also tell the Court that non-purchaser confusion is
20 at issue in this case. The Lanham Act protects, certainly,
21 against affiliation as to source -- sorry, confusion as to
22 source, mistaken affiliation, sponsorship, or approval, but
23 the type of confusion we're seeing is not just point of sale
24 or initial interest and affiliation. We're seeing confusion
25 on behalf of those who influence decisions.

1 We're seeing confusion by and from those who
2 participate in the airport ecosystem. We're seeing
3 confusion from those who may assist people with travel,
4 family members, rideshare personnel, a friend giving another
5 friend a ride and typing something into Google Maps. The
6 type of confusion that we're seeing, we think, is plentiful,
7 and very unusual to have so much of, in so many different
8 forms, at this early stage in a case.

9 I want -- I appreciate the question. What struck me in
10 preparing for the hearing is that this injunction is
11 necessary for the reasons in our paper, and for an
12 additional one. In the absence of an injunction, Oakland's
13 infringing use, and likely those of its airline partners,
14 will multiply at a fast pace.

15 Right now it appears that the name change is in the
16 middle innings, to use a baseball metaphor. There's a sign
17 or two at Oakland Airport. There are plenty of references
18 to Oakland International Airport still at the airport. The
19 new trademark is on the Oakland web site and social media.
20 It's bled onto other web sites.

21 It's too big an airline to put in declarations saying
22 that they're not using the new name, but, just as with other
23 airline web sites' apps, third parties, third-party apps,
24 who haven't yet adopted the new name, that can change in an
25 instant.

1 And it would be surprising to us if the airlines,
2 including the two who submitted declarations on Oakland's
3 behalf, aren't watching to see what happens today before
4 they embark on a name change, because why would they do it
5 in the middle of this proceeding? And that is -- we want to
6 prevent further proliferation, and San Francisco has tried
7 to get Oakland to do the right thing, and so today we're
8 here to ask the Court to put a stop to it.

9 Your Honor is familiar with the legal framework for
10 trademark infringement. Does San Francisco own a valid
11 trademark? Can it establish under ample precedent of the
12 Court the likelihood of success on the merits of its
13 infringement claim, and otherwise do its arguments raise,
14 quote, "serious questions" and the other injunction factors
15 weight in its favor?

16 I'll start with the first, walk through the Sleekcraft
17 "likelihood of confusion" factors, with the assistance of a
18 few slides, and conclude with a discussion of the remaining
19 PI factors. The evidence showing a likelihood of confusion,
20 we submit, is overwhelming, especially in comparison to the
21 evidentiary records in other cases from this district
22 granting preliminary injunctions.

23 To start at the top, only one entity in the world owns
24 a U.S. trademark registration leading with "San Francisco"
25 and covering airport services. Only one entity has operated

1 in Northern California for the last 50-plus years called
2 "San Francisco International Airport." Only one entity is
3 known as "the San Francisco Airport." Only one entity has
4 secondary meaning in San Francisco in connection with
5 airport services. That entity is the city and county of San
6 Francisco, and for its trademark registration and common-law
7 rights to mean something, a neighboring airport cannot copy
8 that trademark and incorporate the entirety of it into its
9 own.

10 It's virtually unprecedented to have two different
11 owners operate competing airports with the same name. It's
12 unprecedented to have two different owners operating
13 competing airports serving international travelers with
14 entire overlap between the senior owner's trademark and the
15 junior user's trademark. We're unaware of a single case in
16 which a trademark and name with so much historical
17 significance and secondary meaning was taken by a competing
18 airport.

19 San Francisco's trademark, which is registered, is "San
20 Francisco International Airport." It's un rebutted that that
21 registration is incontestable, which, by statute, means it's
22 conclusive evidence that the registration is valid, that the
23 mark is not descriptive, including geographically
24 descriptive -- it cannot be attacked on that basis -- that
25 the trademark functions as a source identifier for airport

1 services, and San Francisco owns that mark, and has the
2 exclusive right to use it, and comes straight from the
3 statute and from the Supreme Court's Oregon Flag (phonetic)
4 case.

5 So we don't believe there's any dispute as to the first
6 factor in the trademark infringement analysis, which brings
7 us to the Sleekcraft "likelihood of confusion" factors, and
8 first the strength of the mark, and if your Honor has any
9 questions about this, please feel free to jump in.

10 THE COURT: For strength of the mark, I think your
11 position is that the mark is commercially strong, but not
12 conceptually strong. Is that right?

13 MR. GHAJAR: The mark is -- we are not arguing
14 it's conceptually strong. Years ago, it started out as a
15 mark that is descriptive or suggestive, which the courts
16 find is conceptually weak. A descriptive mark, including a
17 geographically descriptive mark, becomes strong over time.

18 I would respond to that question two different ways as
19 well, and that is, where a mark is incontestable, it is
20 conclusive evidence of its secondary meaning, and so it
21 satisfies the distinctiveness test, but here what we've put
22 into the record, we believe overwhelmingly, is evidence of
23 commercial strength, and in cases involving weak conceptual
24 marks, many courts have recognized a mark is strong even
25 where -- commercially, even where the conceptual strength is

1 not there.

2 And so we have an internationally renowned trademark, a
3 famous brand. It represents a carefully cultivated
4 experience, built up at enormous expense. It's been used
5 for 70 years. San Francisco has been the only airport to
6 use the "San Francisco" and "San Francisco International
7 Airport" names as source identifiers in connection with
8 airports.

9 It appears before tens of millions of travelers
10 internationally who pass through the airport, on the web
11 site, in awards, press recognition, on Google Maps, Google
12 searches, on social media, on airline web sites, on travel
13 web sites, on hotel web sites, in unsolicited press. It
14 appears on signage, the one on the 101 Freeway, as shown in
15 the slide, where thousands of travelers pass it every single
16 day going north and southbound on the 101 Freeway.

17 San Francisco's use and recognition turned a
18 geographically descriptive name into one with established
19 secondary meaning and commercial strength. It deserves a
20 high degree of protection, especially as to uses in a
21 competitive field, i.e., another airport, and benchmarking
22 against authorities in our brief, and your Honor's decision
23 in Align v. Strauss, and by any objective measure, the
24 evidence, including marketing and sales figures and
25 accolades, establish that "San Francisco International

1 Airport" is a strong mark.

2 THE COURT: From the evidence that the parties
3 submitted, it seems that the IATA code, "SFO," plays a
4 prominent part in the branding for the airport. How, if at
5 all, is that relevant to an inquiry about the strength of
6 the mark?

7 MR. GHAJAR: That was a -- it's a curious but
8 interesting argument. That IATA code doesn't always appear
9 when third parties refer to the airport brands. The IATA
10 code does not appear and isn't pronounced in radio ads. The
11 IATA code isn't, and doesn't appear when people are
12 referring to the airport by the brand in conversations. The
13 IATA code doesn't always appear in the materials as well.

14 And so the IATA code here -- another argument is that
15 we know what an IATA code is and what it means because of
16 our involvement in this case, but international travelers
17 don't. There's no evidence that people outside of
18 California understand what an IATA code is or would know
19 that "OAK" is an IATA code for a different airport than the
20 San Francisco International Airport, and in some ways, and
21 when used with the new infringing name, it can exacerbate
22 the likelihood of confusion, because consumers will believe,
23 when they see these near-identical brands, and one says,
24 "OAK" at the end, and one says, "SFO" -- they might think
25 that there's some sort of sponsorship or affiliation between

1 the airports, and that doesn't -- is not, in fact, the case.

2 We've also cited, and I would refer the Court to,
3 decisions in which two brand owners used starkly different
4 logos, and courts, including Judge Illston in a recent case
5 involving the MX v. Socios.com mark, observed that logos
6 doesn't appear in marketing -- every piece of marketing
7 material, and they certainly don't appear spoken text, and
8 they don't appear in third parties' press referring to the
9 name. And so even logos, powerful logos with
10 source-identifying capability, are not enough to negate or
11 mitigate the actual and likelihood of confusion.

12 We took the Court through some of the cases in our
13 briefing. I'll touch upon a case that we think is highly
14 instructive here, the North American case, (indiscernible) a
15 slide. There the benchmarks of strength were less than what
16 we've established in this case. The Coachella case said a
17 geographic name for an area in California -- the Court
18 issued a preliminary injunction in that case, finding that
19 the trademark was strong. We've included some metrics in
20 the slide for comparison purposes.

21 Next slide, please.

22 Another case. This is a case out of the Central
23 District of California, from Judge Wright, finding that Mars
24 Advertising, not to be confused by (sic) Mars, the candy
25 company, was a strong mark in issuing a preliminary

1 injunction where the mark had been used for 50 years and had
2 household-name clients. We don't believe this is even
3 comparable to the showing in our case.

4 I want to move to -- and then your Honor's decision in
5 Align -- we won't repeat the facts, but we believe our
6 showing is strong in comparison, and then the Greater
7 Orlando case. This is a trademark trial of an Appeal Board
8 case. We believe this is highly instructive as well, and
9 the benchmarks of strength there were comparable to what
10 you've been shown in this case.

11 I'll go to the similarity or sort of relatedness of
12 services. This is a factor that didn't get a lot of
13 attention in Oakland's brief, and for good reason. It's not
14 a factor that favors them at all. To the contrary, here we
15 have competitor airports. They're the same exact services,
16 and there's no real dispute on this point, and I'll refer
17 the Court to a decision from the Northern District finding
18 that where services are directly competitive, a lesser
19 degree of similarity is required to show likelihood of
20 confusion, and here that factor certainly favors San
21 Francisco.

22 Next slide.

23 On similarity of marks, we've touched upon that with
24 our discussion about logos and IATA codes. Under the
25 governing case law, similarities must be weighed more

1 heavily than the differences, and Oakland cannot control
2 third parties and publications that refer to the infringing
3 mark, and those people wouldn't use the Oakland logo or the
4 IATA code, and we see that in some of the examples in our
5 papers and in the next slide, where you see use of the new
6 name either truncated, with the IATA code at the end, or not
7 appearing at all, and these are examples that are in our
8 briefing.

9 And so, because Oakland, and certainly San Francisco,
10 cannot control the way Oakland's infringing name appears,
11 this factor does weigh in the City's favor, and on the IATA
12 code issue, we see no evidence that the existence of them
13 affects consumer perception at all.

14 THE COURT: I have a question about this. The new
15 name for the Oakland Airport causes other companies to use
16 it, for example, Google Flights and Priceline.com. In
17 looking at Ninth Circuit case law dealing with initial
18 interest confusion on the Internet, often there is -- the
19 defendant purchased an ad word that's the plaintiff's
20 trademark term, or the defendant is, you know, Amazon, the
21 entity that returns the list of searches.

22 Here I don't see any evidence -- I mean, it could be
23 true. I just don't know of any evidence -- that the Oakland
24 Airport is purchasing the San Francisco trademark as an ad
25 word, and the Oakland Airport isn't delivering the search

1 results that Priceline or Google Flights would return.

2 So how does this situation, when adopting a new name
3 causes other web sites to use the name and return a search
4 result -- how does that fit into the case law about initial
5 interest confusion?

6 MR. GHAJAR: I think it is certainly an important
7 piece of evidence. It's a consequence of choosing a
8 confusing name and putting it out there, and it goes to the
9 issue of lack of control that I alluded to, and that's why
10 this is so dangerous. The names are near identical, and for
11 Priceline and Google to then adopt it, incorporate it,
12 without an IATA code, with an IATA code, it is evidence of
13 similarity and of confusion.

14 Certainly it's not their fault. It's not Google's
15 fault or Priceline's fault. That's why it falls on Oakland.
16 The fault lies with Oakland for choosing such a similar
17 name, and the courts recognize that, in the Rearden case in
18 the Ninth Circuit, for example, recognizes that all sorts of
19 confusion may be relevant in assessing a likelihood of
20 confusion, including non-consumer confusion and different
21 types, and Rearden has a very nice discussion of that.

22 And so confusion that occurs because a company chooses
23 an infringing or confusing name, and then others proliferate
24 it, is relevant confusion. It's confusion nonetheless.
25 It's confusion that would not have occurred, your Honor, but

1 for the Defendant's decision to adopt an infringing name.

2 And I think, in the interest of time, I will -- we've
3 talked a little bit about the similarity of marks, actual
4 confusion here. I've read your Honor's decisions on
5 trademark cases, and your Honor is aware that actual
6 confusion evidence is actually very difficult to find, and
7 we've submitted quite a bit.

8 I would point the Court to confusion that we recently
9 uncovered, that happened after we filed our initial brief,
10 with the Andretta (phonetic) declaration at ECF 64. That is
11 an example where an airline professional, person from the
12 airline Iceland Air, took a meeting with San Francisco Bay
13 Oakland Airport believing it was meeting with San Francisco
14 International Airport.

15 We have the traveler confusion in the daily operation
16 log that is attached to Mr. Schuler's (phonetic)
17 declaration -- or Mr. Yaeckel's (phonetic) declaration,
18 nearly two dozen examples, and that evidence tracks
19 instances where individuals have shown up at the San
20 Francisco Airport, having intended to go to the San
21 Francisco Bay Airport.

22 And our evidence is not exhaustive. It can't be. It's
23 only the people who took a moment to find one of the
24 information booths at our airport, wait to speak with
25 personnel, and then asked a question that indicated they

1 were confused. Imagine how many people figure it out
2 themselves, don't figure it out, are frustrated, rushed,
3 harried, and have to go and drive a distance to get to the
4 airport that they intended to go to, but for the confusion.

5 And this relates only to confusion that's happening at
6 San Francisco Airport. We don't know what's happening at
7 Oakland Airport, and that is concerning because, in
8 Oakland's papers, they submit declarations from Oakland
9 personnel, and my colleague can correct me if I'm wrong, but
10 you know what I didn't see in those declarations? Any
11 evidence that Oakland made an effort to canvass people at
12 their airport to see what kind of confusion is happening or
13 not, i.e., the absence of confusion.

14 In a typical trademark case, a defendant will say,
15 "I've done an exhaustive search of X, Y, and Z, and we have
16 no evidence of confusion." Now, that's not dispositive at
17 all in the actual confusion analysis, but at least the
18 defendant comes out and says that. Oakland has not, and we
19 believe that, in conjunction with the lack of production in
20 response to public records requests on this very issue, it's
21 very telling.

22 And so, on the one hand, you have dozens of examples of
23 confusion in the form of traveler logs, travelers showing up
24 at our airport, social media commentary, geotagging, all
25 types of confusion that courts, from the Kiva case to

1 Ironhawk case, the Orlando case, even your Honor's decision
2 in Align, recognize as probative on confusion, particularly
3 at the preliminary injunction stage, and we have a survey as
4 well, and there's a lot of briefing on that. So I'm not
5 going to spend a lot of time on that. As needed, my
6 colleague, Judd Lauter, will address that.

7 I want to go to the other Sleekcraft factors, slide 18,
8 marketing channels. This is another factor that didn't get
9 a lot of discussion in Oakland's papers, and it's because it
10 overlaps completely here. These are competing airports who
11 advertised to the same customers. They appear in some of
12 the same rankings and publications. They promote themselves
13 through social media and through third-party publications.

14 The airports market and serve OTAs, the online travel
15 agencies, rideshare, nearby hotels, restaurants, and a host
16 of others. The marketing and trade channels directly
17 overlap in every way. We're not simply saying that, because
18 both parties have web sites, that there's overlap. We're
19 saying that, in every meaningful way, the marketing
20 channels, the trade channels, are identical. That, too,
21 weighs in favor of the likelihood of confusion, and isn't
22 contested.

23 Briefly on sophistication to degree of care, the law
24 doesn't only protect the most sophisticated. In fact, the
25 law protects the last sophisticated, and we can hypothesize

1 that some airfare costs \$1,000, and, therefore, those people
2 wouldn't be confused. First, I believe the evidence of
3 actual confusion shows that the cost of the airfare or
4 circumstances through which people deal with airports -- it
5 certainly hasn't mitigated confusion.

6 Second, I would also submit that airfare can be cheap,
7 and courts have found regularly that items that cost less
8 than \$100 that can be bought on line particularly quickly
9 are not the type of purchases that lend itself to a high
10 degree of care. And so we believe that this factor weighs
11 in our favor, and certainly does not weigh against the
12 likelihood of confusion.

13 On the issue of intent, I'll spent a minute on that.
14 Like actual confusion and likelihood of expansion, these are
15 not factors that a plaintiff needs to carry to establish a
16 PI. Good faith is not a defense to trademark infringement.
17 But I would submit to your Honor that the intent factor is
18 meaningful here.

19 I asked earlier one question that came to mind, "Did
20 Oakland run a trademark diligence through outside trademark
21 counsel to understand whether the name San Francisco Bay was
22 available for use and registration?" But I don't know that.
23 We may never know that. But there are some telltale signs
24 of intent that is recognized by the courts as impactful on
25 this factor.

1 There is no dispute that they were aware of San
2 Francisco's registered trademark and brand recognition.
3 Oakland had the same name for decades, Oakland International
4 Airport. It used that as a trademark. It registered it as
5 a trademark. It took steps to establish that no one else
6 can use "Oakland" in connection with an airport, and this
7 name replaces it. It's being used as a trademark.

8 They haven't filed a new trademark application for the
9 new name, and I would posit that the reason is that, had
10 they done that, the USPTO would have rejected it, and they
11 didn't want that to happen during the pendency of these
12 proceedings. There has been no effort by Oakland that we've
13 seen to track confusion, and utter silence in the
14 declarations about what they know and what efforts they've
15 made to uncover potential confusion at their airport, and we
16 believe --

17 THE COURT: Let me ask you, even if the new name
18 was a misguided decision, the port has submitted several
19 declarations saying that the underlying problem that we're
20 trying to solve for is that some airline travelers don't
21 know where Oakland is, and so, even if the new name is, in
22 effect, misleading, they're claiming that's what their goal
23 was, was to inform the public where the Oakland Airport is.
24 Is there reason to doubt that that was the problem they were
25 trying to solve?

1 MR. GHAJAR: I think there's reason to doubt, but
2 it doesn't matter. It doesn't matter because what they
3 intended, and their purported need, doesn't trump our
4 trademark rights. It doesn't trump our incontestable
5 registration. It doesn't negate the confusion and the
6 likelihood of confusion that's being caused.

7 So their purported need is, I would submit, your Honor,
8 entitled to little or no weight, and I referenced at the top
9 of the argument that if they wanted to educate people where
10 their airport was, the way to do it wasn't to change their
11 name to adopt our trademark. They could say, as we've
12 noted, that their Oakland International Airport is located
13 in or around or near the Bay, the San Francisco Bay. So
14 they didn't need to. This is a way for them to create
15 confusion that inures to their benefit and to the detriment
16 of the City.

17 And so we believe that we have evidence on every
18 factor. We believe that we have established irreparable
19 injury. We're entitled to the presumption, provided that
20 we've made a showing, as we have, on the likelihood of
21 confusion factors. We have evidence of irreparable injury,
22 or what good is a trademark and 70-plus years of cultivated
23 good will if another competing airport can adopt a
24 confusingly similar name, and cause so much confusion, and
25 hold our reputation in their hands? What happens if there's

1 a survey that ranks Oakland's airport below, and people
2 think it's the San Francisco Airport? There's so much
3 danger, and I address it in my rebuttal, of injury.

4 On the balance of equities, your Honor, I would close
5 by saying that Oakland really didn't defend on that
6 particular factor. It says that if your Honor issues an
7 injunction, it will likely have to change the name
8 altogether, which it should. It doesn't put in any evidence
9 of its investment, of the cost of changing, and so there's
10 no basis on the one side of the scale to find that the
11 balance of equities could or would weigh in Oakland's favor.

12 And, finally, as in every trademark case where there's
13 confusion and a likelihood of confusion, the public has an
14 interest in not being confused, and we believe we've shown
15 through myriad examples that that is happening, and we want
16 it to stop.

17 THE COURT: Thank you, Counsel.

18 Let's hear San Francisco's argument concerning whether
19 the city of Oakland is a proper party to the motion.

20 MR. STEVENS: Good afternoon, your Honor. Ryan
21 Stevens from Cooley.

22 Now, the issue before the Court is actually not whether
23 the city of Oakland is a proper party. Oakland concedes in
24 its brief that Oakland, acting by and through its Board of
25 Port Commissioners, is a proper party. So, at a minimum,

1 the city of Oakland is a party to this dispute in some form
2 or another. The question more specifically is whether there
3 are multiple Oaklands, and whether the other Oaklands,
4 Oakland by and through its city council or Oakland just
5 generally, have been improperly joined.

6 And I want to start by pointing out that, from San
7 Francisco's perspective, this whole issue is a sideshow
8 distraction. The issue is, does Oakland infringe on San
9 Francisco's trademark? And rather than confront that issue,
10 Oakland has instead created this distraction, which was
11 entirely of their making.

12 Now, if you turn back to ECF 1 and look at the City's
13 initially filed complaint, we sued Defendant City of
14 Oakland, acting by and through its port commissioners. We
15 define that as the Defendant in the introduction, and then
16 again in paragraph eight of the complaint when listing the
17 parties, and the city of Oakland came to us and said, "No,
18 that's wrong," but that's the same party that Oakland's
19 brief now admits is a proper Defendant.

20 And so, at Oakland's urging, we changed the complaint.
21 We amended it. We changed it to "Defendant City of Oakland
22 and Defendant Port of Oakland," a department of the city of
23 Oakland which operated the Oakland Airport, acting by and
24 through the Oakland Board of Port Commissioners. Now, we
25 thought that was the end of this dispute, but Oakland came

1 back to us and said, "No, you have to dismiss the city of
2 Oakland completely."

3 And so, again, San Francisco sought to avoid motion
4 practice on this issue, and we offered a very reasonableness
5 stipulation to Oakland. We said, "Agree that you will abide
6 by an injunction of this Court, and we will let you out of
7 this litigation," and that stipulation and that dialogue
8 with Oakland is set forth in the declaration of Christopher
9 Stuart. That's at ECF 68. Specifically, ECF 68-2 contains
10 the conversation with Oakland. So all Oakland had to do was
11 stipulate that Oakland at large would abide by an injunction
12 issued by this Court.

13 THE COURT: Well, let me ask you about that,
14 because I think that point goes to the issue I'm thinking
15 about, which is what, if any, are the practical implications
16 of this argument? Suppose I issued a preliminary injunction
17 against the Port of Oakland. Does that leave some necessary
18 personnel unenjoined? In other words, are there people who
19 work for the city of Oakland, but not specifically for the
20 port department, who would need to do something to
21 effectuate a preliminary injunction?

22 MR. STEVENS: Yes. I mean, I think the Court is
23 cutting to the heart of the issue. Why does this matter?

24 THE COURT: That's the question.

25 MR. STEVENS: And it matters -- San Francisco's

1 perspective is it only matters because Oakland thinks there
2 is something that they can do if only the port is bound, and
3 if they did not think that, there would have been no reason
4 to enter the offered stipulation.

5 You know, we don't want to sue the city of Oakland if
6 we don't have to. What we don't want to do is obtain a
7 favorable injunction and then have to go department by
8 department by department to enforce it. We want one order.

9 And the other thing I want to point out is, you know,
10 not only did they force us to amend the complaint, but
11 nowhere in the initial or the amended complaint did we sue
12 the city of Oakland acting by and through its city council,
13 which is what they moved to dismiss -- or, I'm sorry, "moved
14 to dismiss" isn't the quite (sic) nomenclature, but that is
15 what we're accused of doing. We just said, "The city of
16 Oakland," and they chose to interpret it that way, and so
17 they have really forced this issue on the Court, which has
18 caused us to wonder, what is it that they think they can do?

19 And it's especially confusing here because it's a
20 trademark dispute. If the Court finds that Oakland's new
21 name infringes, it infringes, and no Oakland, whether it's
22 the city council, the port, Oakland generally, gets to use
23 the infringing mark.

24 And so, you know, we've taken the position in our brief
25 that the Court may not even really need to decide this issue

1 today. If the port enjoins the Port of Oakland, and anyone
2 acting in concert with the Port of Oakland, and anyone who
3 would take any steps to advertise, disseminate, promote this
4 infringing mark, then I think we're satisfied. We don't
5 need the name. We want the result.

6 And if you are inclined to reach the decision of
7 whether the city of Oakland generally should be dismissed, I
8 do just want to make a few quick points on why we disagree
9 with that, and the first is just simply that the port is a
10 division of Oakland. It acts on behalf of Oakland. The
11 port doesn't commit trademark infringement on behalf of the
12 port. It does it on behalf of Oakland.

13 I want to briefly address the Thibodeaux case that
14 Oakland submitted by declaration. The Westlaw cite is 2018
15 WL 4853299. That was a fairly recent decision from Judge
16 Westmore, and there the plaintiff brought Clean Water Act
17 claims, and he brought them against the Port of Oakland, and
18 the city of Oakland moved to dismiss, alleging that he had
19 failed to join a mandatory party.

20 Judge Westmore denied that motion, and held it's really
21 up to the plaintiff who he wants to sue, but, if he wanted
22 to only sue the port, then he would be limited to recovering
23 damages for things that happened on port property. I don't
24 read that as the same as saying that he couldn't have sued
25 the city generally for what the port did. It just said, "If

1 you choose to sue the individual department, you only get to
2 go after that department."

3 The final point I want to make, briefly, is that
4 Oakland describes the port as an "agent," and that language
5 is taken from the California Supreme Court, the Hogan case.
6 It's a 1940 case, and we don't disagree that the port is an
7 agent. We disagree that, because they're an agent, they
8 should be dismissed from the litigation. I think it's
9 fairly standard black-letter law that the principal can be
10 liable for the act of the agent, and we've cited the
11 Schertzer case, 109 F.4th 1200. It's a Ninth Circuit (sic),
12 2024, and it says:

13 "A principal who conducts an activity
14 through an agent is subject to liability
15 for harm to a third party caused by the
16 agent's conduct."

17 And here our argument is simply the port is the agent.
18 The agent harmed us by infringing on our mark, and the
19 principal, the city, is liable.

20 And with that, unless the Court has any questions, I
21 will yield the remainder of my time.

22 THE COURT: Thank you, Counsel.

23 MR. STEVENS: Thank you.

24 THE COURT: Let's hear from the Port of Oakland
25 concerning the merits of the preliminary injunction motion.

1 MS. BALANDA: Thank you, your Honor. I have,
2 actually, an old-school handout rather than a PowerPoint.
3 May I approach?

4 THE COURT: Have you provided it to the Plaintiff?

5 MS. BALANDA: Yes.

6 THE COURT: Okay.

7 MS. BALANDA: Yes, your Honor, I have.

8 THE COURT: Thank you.

9 MS. BALANDA: Good afternoon, your Honor. I want
10 to begin by stepping back for a moment. SFO is asking the
11 Court for extraordinary relief at the outset of this case.
12 SFO is asking the Court to enter a preliminary injunction
13 not to preserve the status quo, but to require the port to
14 change the name of its airport, the ultimate relief it seeks
15 by final judgment, and its burden to obtain that relief is
16 incredibly high.

17 SFO's motion cannot be granted unless SFO makes a clear
18 showing, with substantial proof, that it's likely to win,
19 that the city of San Francisco will suffer irreparable harm
20 unless we change the name now, that the balance of equities
21 tips in their favor, and that the injunction is in the
22 public interest. SFO does not come close to meeting its
23 burden. Let's start with the merits. SFO's claim is
24 that -- is about whether the full --

25 THE COURT: First I have a factual question.

1 MS. BALANDA: Sure.

2 THE COURT: I understand that, before the name
3 change, the technical legal name of the airport was the
4 Metropolitan Oakland International Airport. However, in
5 looking at the evidence, it seems that, in its branding, the
6 airport called itself the Oakland International Airport,
7 without the word "Metropolitan," even though that word was
8 part of the legal name of the airport. Do you agree that,
9 before the name change, the Oakland Airport generally, in
10 its branding, didn't use the word "Metropolitan"?

11 MS. BALANDA: Your Honor, I can't speak to the
12 branding that happened since the name was put into place.
13 1950 was when they started using "Metropolitan." From what
14 I've seen, that's correct, your Honor. I would agree with
15 that. But, in terms of what else is out there in terms of
16 evidence -- and I think this just points out the prematurity
17 of SFO's motion. There are dozens of these types of fact
18 issues for which we -- you know, discovery would be
19 informative.

20 So SFO's claim is whether the full name of the airport,
21 the San Francisco Bay Oakland International Airport, is
22 likely to cause consumer confusion. There are two key legal
23 principles that must guide the Court's analysis here.
24 First, the Ninth Circuit has repeatedly said that trademark
25 infringement protects only against mistaken purchasing

1 decisions, not confusion generally.

2 THE COURT: Well, doesn't it also protect against
3 false claims of affiliation or against initial interest
4 confusion?

5 MS. BALANDA: Connected with purchasing decisions,
6 that's right. The actual confusion at issue -- as a
7 consumer, you're consuming something. It's purchasing.
8 It's tied to purchasing. It's about the purchasing
9 decision. And so that is a type of purchasing confusion,
10 and, in fact, in the Rearden case, the Ninth Circuit said,
11 "The analysis must remain focused upon confusion in the
12 marketplace, as opposed to generalized public confusion."

13 And as an initial matter, the direct consumers of
14 airport services are the airlines, who pay money to park
15 their airlines -- their airplanes -- at the gates, and the
16 businesses who lease space at the airport. Airports are
17 really landlords for those businesses. Those are the most
18 direct consumers of the airport services.

19 SFO presents zero argument and zero evidence that any
20 airline or business has mistakenly leased space from OAK,
21 thinking it's SFO or not run or affiliated with the city,
22 but if the Court accepts the premise of SFO's motion that
23 the consumers of airport services are airline passengers,
24 the purchasing decision regarding the use of airport
25 services is the buying of an airline ticket, and the vast

1 majority of those consumers search for and buy airline
2 tickets on line, and that's undisputed. So the Court's task
3 here is to evaluate the name San Francisco Bay Oakland
4 International Airport as consumers encounter it in the
5 real-world marketplace, as they make purchasing,
6 ticket-purchasing, decisions.

7 And, second, to evaluate the likelihood of confusion in
8 the relevant marketplace, the Court uses the Sleekcraft
9 factors, but not as a checklist. In fact, the Ninth Circuit
10 has repeatedly instructed against this approach, said it's
11 not supposed to be applied as a closed, rigid checklist,
12 and, in fact, depending on the facts of the case, only a few
13 of these factors may be relevant and informative, and
14 additional context or other variables might be crucial to
15 the analysis.

16 THE COURT: One of the arguments that the port has
17 emphasized is that the new name is intended to explain the
18 proximity of the airport to the San Francisco Bay, and I
19 have a question about that. I can understand why customers
20 would want to know that the Oakland Airport is near San
21 Francisco, or that it's in the San Francisco Bay area, but I
22 don't understand why airline customers would care about the
23 proximity of the airport to a body of water.

24 If you were renting a boat, then you would care that
25 the boat rental place is near the water, or, if you're using

1 the port's seaport, you would want to know that it's near
2 water, but I don't see why airline customers would care
3 whether the airport is near the bay or on the bay or a few
4 miles away from the bay. But you do emphasize that argument
5 a number of times in the briefing, about the proximity to
6 the body of water, and so I'm wondering if you can shed some
7 light on why that would be of interest to airline customers.

8 MS. BALANDA: Sure. I think for two reasons. I
9 think, one, "San Francisco Bay" defines a region as well.
10 So, when you talk about the San Francisco Bay and the body
11 of water, it's communicating an area, the San Francisco Bay
12 area, and also communicating that we're on the bay,
13 communicates to people to look where we're at, and you can
14 actually -- if you pull up a map, there's a lot you can
15 learn, for people not from this area, about where, exactly,
16 Oakland is in relation to other major area attractions and
17 destinations, by seeing where it's actually situated on the
18 bay. So that's what I would say for that, your Honor.

19 So, Sleekcraft. Thinking about these Sleekcraft
20 factors, again, the Ninth Circuit has said, "We need to
21 focus on what are the most important factors that's going to
22 actually illuminate the confusion inquiry here," and in
23 Network Automation, 638 F.3d 1137, the Ninth Circuit
24 actually reversed a District Court grant of a preliminary
25 injunction because it employed a rigid checklist approach

1 that resulted in the Court placing emphasis on the wrong
2 factors, and because the Court declined to consider the
3 context of what was shown on the screen, other than the text
4 of the advertisements themselves.

5 THE COURT: I take it from the briefing that you
6 think the most important factor is the context in terms of
7 what customers see when they're in the process of booking a
8 flight. Is that right?

9 MS. BALANDA: That's correct. And the sort of
10 oddness here about third parties, airlines being in sort of
11 control of how that information is displayed to airline
12 consumers, is because, again, the direct consumer of the
13 airport services is the airlines themselves, and the
14 businesses that rent space at the airlines. So we're sort
15 of in this odd position of, well, then, the second-level
16 consumers for airline -- airport services are actually the
17 ones buying the flights from the airlines.

18 And so that's why you have sort of this middleman
19 approach, but, again, assuming that the consuming -- the
20 relevant consumer here are the consumers buying airline
21 tickets, then yes, that's the most important thing. If
22 we're going to evaluate, "Is this name actually going to
23 cause confusion in their purchasing decision?" we've got to
24 look at what they see when they make their purchasing
25 decision.

1 So let's take a look at that, your Honor. If you
2 could -- I have provided record excerpts here, and I just
3 want to walk through what a consumer actually sees when they
4 go to buy a flight. So the first tab there is just --
5 you'll the Port of Oakland's web site. Again, we maintain
6 the "I Fly OAK" branding, but that's again not where
7 consumers go to buy their flights. Where they go is to
8 airline web sites, OTAs, flight aggregators.

9 So the first tab following that, Southwest Airlines.
10 Okay. So we want to book a flight. We're going to start to
11 type in the departure, "San Fran," and immediately it drops
12 down, and this, again, according to Southwest Airlines' own
13 testimony and spreadsheets from that declaration, three
14 options, cities, (indiscernible) coast. Turn the page, you
15 get another drop-down menu, OAK to SEA, Oakland, California,
16 to Seattle/Tacoma, Washington, SFO to SEA, San Francisco,
17 SJC to SEA, San Jose to Seattle, alphabetical results. Then
18 we turn the page.

19 Contrary to SFO's assertion, this is not something that
20 Southwest is doing because it's afraid that it's going to
21 implement an infringing mark. That's just not true at all.
22 The reality of the marketplace is this is how airlines
23 display airports in regions that are (indiscernible) more
24 than (indiscernible). So the next page in the booklet there
25 is Washington, D.C., area airports. You start to type in

1 "Washington," and you get a drop-down of city names and
2 references. Again, it's because consumers are booking
3 flights to places, not because of an airport's brand.

4 Okay. And then you go to the next page, same thing,
5 the Los Angeles area. A consumer starts to look for a
6 flight to Los Angeles, and a drop-down menu appears, with
7 airports identified by their city location and their
8 three-letter code. Passengers may not know their called
9 IATA codes, but I think there is a general familiarity.

10 When you're making a purchase, you can see the IATA
11 code. It's listed. In every single piece of evidence in
12 the record, on a screen that a consumer sees when they go to
13 purchase a flight, search for a flight, the airports have
14 the IATA code. And then you flip to the next page, and this
15 is the mobile presentation from Southwest. Again, San
16 Francisco-area airports, Los Angeles-area airports,
17 Washington, D.C.-area airports listed, city names and code
18 references.

19 And this is not unique to Southwest, so, the next tab,
20 I'm going to go search on Alaska. I start to type in "San
21 Francisco Bay Area," drop-down menu, city codes, city
22 references, airport codes, and you turn the page, and you
23 click on those flights, and it gives you a list, and what
24 information does it show you? It shows you IATA codes, SEA
25 to SFO, SEA to SJC.

1 If you flip a few, there's a lot of options. Flip a
2 few pages, now you have your trip summary, so now you're
3 getting closer to purchasing, and it shows you Seattle, SEA,
4 to San Francisco, SFO. Now it moves to your cart, same
5 thing, city and IATA code references, and if you had
6 selected a flight to Oakland, Seattle to Oakland, Seattle to
7 Oakland, in your trip and in your cart.

8 Next tab, Delta Airlines, same thing. You start to
9 type in San Francisco, airline, gives you a drop-down with
10 codes, a three-letter SFO, SJC, OAK, and the city
11 references, and then the final tab, Booking.com, this is an
12 online travel agency.

13 So, this one, they actually used the full airport
14 names, but, again, you see the IATA code, the three-letter
15 call letter codes, bolded, actually, is what this web site
16 does, but that's included, as well as the city reference.
17 Every single piece of evidence in the record that shows a
18 spreadsheet of what a consumer would actually see when they
19 start to search for and buy a flight includes this
20 contextual information, and it plainly dispels any
21 likelihood of confusion when going to book a flight about
22 where you're going or about which city the airport is
23 affiliated with.

24 THE COURT: What about the affiliation claim,
25 though? Because you're talking about literal confusion of

1 OAK with SFO. What about customers who know that the
2 Oakland Airport is a different airport from SFO?

3 For example, they have a flight to or from the Oakland
4 Airport, and so they know where they are. They're in that
5 airport. They meant to go there. They're not mistaken
6 about that. But they have a bad experience, and you saw
7 that San Francisco put in some of their evidence that SFO is
8 very highly rated and gets good consumer ratings, and they
9 say that the situation is different for the Oakland Airport.

10 What about San Francisco's argument that putting the
11 San Francisco mark in the name of the Oakland Airport could
12 cause confusion about ownership or association or
13 affiliation such that customers at the Oakland Airport might
14 think that that airport is associated with SFO?

15 MS. BALANDA: So I would, I guess, disagree with
16 the premise, first, that we incorporated the mark into our
17 mark, and I'll get to that point later, but SFO has produced
18 no evidence that anyone purchased a ticket or decided to
19 purchase a ticket because they thought that our airport was
20 affiliated with SFO, or declined to purchase a ticket to SFO
21 because they thought it was affiliated with OAK, and,
22 therefore, it's, you know, a terrible place to fly.

23 And, in fact, the evidence in the record shows that,
24 since we changed our name back in May, SFO's routes have
25 increased. Their passenger has increased over the same

1 period of time last year, and they've received positive
2 press. There's not one piece of evidence in the record that
3 there's any connection between the online opinion chatter or
4 the generalized confusion actually has translated to any
5 type of affiliation confusion evidence, your Honor.

6 THE COURT: But how would we know? Because, if
7 people are confused, and think that the Oakland Airport is
8 affiliated with the San Francisco International Airport --
9 if they think that, and that causes damage to the good will
10 of the San Francisco International Airport, they would just
11 have that opinion.

12 What would the evidence look like if there was that
13 confusion? I don't see -- they wouldn't raise their hand
14 and say, "Oh, I was confused," because, remember, they don't
15 know that they're confused. They would think there's an
16 affiliation, and not realize that it's untrue.

17 MS. BALANDA: And then the argument is, those
18 consumers would not tickets to --

19 THE COURT: I don't think that they need to trace
20 it through to the purchase of a different airline ticket.
21 It's definitely confusion in connection with the purchase of
22 a ticket, but the ticket is to or from the Oakland
23 International Airport. The issue is damage to the good will
24 held by the holder of the mark from the mistaken belief of
25 affiliation.

1 I think that's the argument that San Francisco is
2 making, and I think the Andretta declaration, towards the
3 end, in the concluding paragraphs, spelled that out there,
4 but I just want to know what your response is to that.

5 MS. BALANDA: Yes. So, again, the type of sort of
6 affiliation evidence that they're talking about is people
7 posting on line. It's so far removed from sort of an actual
8 admissible evidence in terms of opinions, and then I would
9 say, your Honor, there would --

10 THE COURT: Well, that's the actual confusion
11 evidence, where they say people think that the two airports
12 are the same airport, or they get one confused with the
13 other. The good will argument is that people understand
14 their different airports. It's just, they think that by --
15 the City argues that Oakland has taken the City's mark and
16 put it in the name of their airport, and that San Francisco
17 loses control of its mark, and it's essentially with a
18 different -- somebody else's product that they believe is
19 not as good as their product.

20 And so that's the argument there, and I realize you
21 dispute every premise of that, but, if I were to look at it
22 that way, what's the response? You seem to say that there
23 isn't any evidence of this type of confusion, but what is
24 the evidence that's missing? If people have this mistaken
25 belief about affiliation, they would just have that belief.

1 I don't know that they would go around saying anything.

2 MS. BALANDA: No, but it needs to be connected to
3 the purchasing decision, right? I mean, trademark law
4 protects against mistaken purchasing decisions, and so there
5 would be evidence that there is some impact on the
6 purchasing decisions, and this is, again, entirely
7 speculative on this record, right? And so that's what I
8 would say, your Honor, as to that.

9 Okay. So, moving on to the next factor, so we have the
10 contacts. We've actually looked at what consumers see when
11 they go to buy an airline ticket. The degree of care that
12 consumers are going to be exercising when they do so is a
13 heightened degree of care, for three separate reasons.

14 First, we're really looking at Internet commerce, and
15 the Ninth Circuit has stated that the reasonable consumer
16 shopping on line is relatively sophisticated, and, in fact,
17 just about a week and a half ago or so, the Ninth Circuit,
18 in the Lerner and Rowe case, 2024 WL 4537915, the Ninth
19 Circuit reiterated online shoppers are, quote, "Typically
20 savvy enough to differentiate between search engine
21 results."

22 Second, airline tickets are expensive. The record
23 evidence shows that the average ticket price for a domestic
24 flight to SFO is \$444. Yes, they selected one one-way fare,
25 which, I would argue, a restricted fare. There's other --

1 that goes one way. You're going to think extra careful
2 where you're going if you're buying a one-way ticket, where
3 you're going to end up. But, even setting that aside,
4 they're expensive, and that warrants a heightened degree of
5 care.

6 And, third, buying an airline ticket does involve
7 considerations of factors beyond price. That further
8 increases consumers' attention to where they may be going.
9 It is not like buying juice. SFO argues this factor
10 actually weighs in its favor because, according to SFO,
11 reasonable consumers are neither careful nor discerning, ECF
12 35, at page 20, and instead are governed by general
13 impressions.

14 What's telling is that, to support its argument, SFO
15 cites Fleischmann Distilling, 314 F.2d 149. It's a
16 60-year-old case about brewing beer, and it's about the
17 Black and White brand of beer and the Black and White Scotch
18 whisky brand, and the Court was talking about in that case
19 that the standard shouldn't be an expert who would be
20 parsing through who was brewing the beer, who was actually
21 owning the bottling, but instead your average consumer.

22 That case says nothing about the duty of care a
23 consumer would exercise in buying a flight, and, in fact,
24 the BNSF case we cited the Court discussed the level of care
25 that a commercial airline traveler would exercise, finding

1 it would be heightened, given the high price and other
2 considerations involved.

3 THE COURT: Not only the price, but it's a travel
4 plan, so they have to go to the airport. So it would matter
5 to them where it is, right?

6 MS. BALANDA: Right. Yes, your Honor. And SFO
7 argues that the potential buyer class is, quote, "mixed,"
8 such that the Court should consider the most careless
9 potential consumers standard. Well, that's not the law.

10 In the Ford Motor and Brookfield cases that they cite,
11 the Court was discussing a mixed buyer class, in the sense
12 of a class of professionals and ordinary consumers, and the
13 Court said in that case, "Yes, you wouldn't use the standard
14 applied to the industry professional. You would use the
15 standard applied to the ordinary consumers." There is no
16 standard that you would apply, a low standard of
17 carelessness, as SFO argues.

18 And we're not arguing to apply heightened standard
19 because our class of consumers -- again, in the first
20 instance, it's airlines and businesses that lease space in
21 the airport, and then, even accepting that it's purchasers
22 of airline tickets, we're saying they're ordinary consumers.
23 We're just saying that their standard of care is heightened
24 because these things are expensive, and you think about
25 where you're going when you buy a flight.

1 So let's turn to the evidence that SFO has presented.
2 So SFO has not shown -- they've presented zero testimony
3 from any airline, zero testimony from any consumer, zero
4 testimony from any business that does business with SFO or
5 OAK, no third-party testimony at all, zero evidence about
6 leasing any spaces in the respective airports. Instead,
7 what they've produced -- and, in fact, zero evidence
8 regarding any actual purchasing decision, zero.

9 Instead, they present three things, first a handful of
10 online posts and Reddit commentary, and, again, I just want
11 to back up, and that first principle, right, where trademark
12 law protects against consumer confusion regarding mistaken
13 purchasing decisions, not generalized confusion. So there's
14 a handful of opinion posts, Reddit commentary. Most of them
15 are people's opinions about whether they like or hate the
16 name change, and you can always find chatter on line about
17 anything you want.

18 And, in fact, here SFO actually started a messaging
19 public relations campaign at the outset, when they heard
20 that the name change was going to happen, where the airport
21 director, in an e-mail, instructed staff to, quote, "get
22 more aggressive" on their confusion messaging on OAK on
23 social media, and be pushing this out, liking it, repeating
24 it, pushing this message. Even setting aside sort of the
25 lack of foundation, hearsay, how attenuated we are from a

1 purchasing decision here, that evidence is not probative,
2 and, in fact, it's de minimis, and SFO doesn't address that
3 at all.

4 Even assuming all this stuff is real, even assuming
5 that they have found 30 people on line who have commented
6 about being confused about where they go, the number of
7 passengers who have gone through SFO between May and
8 September, some 20,000,000, that number is very, very small.
9 You can always find some level of -- base level of
10 confusion. That's why the Ninth Circuit has recognized this
11 de minimis piece, and so all of that evidence, even if you
12 credit it all, is de minimis, and doesn't show actual
13 confusion.

14 The second thing that SFO offers is the log. This is a
15 one-page paper with 23 lines that unidentified SFO
16 volunteers created for litigation, that purports to document
17 people who supposedly went to SFO instead of OAK for their
18 flight. Again, it's de minimis, even if you credit all of
19 this, but let's set that aside. There's entries with no
20 names, no contact information, flight numbers that don't
21 exist. It's not reliable or probative of anything.

22 And they rely on Kiva Health, but, in that case,
23 actually, the Court denied the preliminary injunction, and
24 the plaintiff had also created a litigation log, and the
25 Court said it lacked trustworthiness because it's created

1 for litigation. The Court viewed the log with skepticism,
2 said it was not entirely reliable, and rejected plaintiff's
3 argument that it weighed heavily in favor of confusion,
4 because it's not.

5 And then the last thing SFO offers is a statement from
6 its head of marketing saying she was at this industry
7 conference and an unnamed person from Iceland Air mixed up a
8 meeting invite. She's testifying about what she thought
9 somebody else thought about being confused, and I think it's
10 even more telling that SFO does not submit a declaration
11 from that person explaining what they were confused about,
12 or how it relates at all to potential consumer confusion,
13 either with the airline or consumers, and it's about a
14 meeting invite.

15 So, again, your Honor, even if you get around these
16 major reliability issues, none of this evidence is about
17 actual consumer confusion on purchasing decisions, and,
18 regardless, it's de minimis.

19 THE COURT: So I know you want the motion denied,
20 but what if I were to grant it? An issue I need to think
21 about is to require the posting of a bond, and, if so, in
22 what amount. Most of what's in front of me on the record is
23 Internet-based advertising, which that entails some expense
24 to change, but I don't think is all that expensive. What
25 would be expensive or could be expensive is ripping down

1 physical signage and replacing it with something else. I
2 imagine that that is more expensive than changing branding
3 on the web site.

4 San Francisco, you've heard in their argument, they
5 think that Oakland has not done much to roll out the new
6 airport name with physical signage at the airport, so I
7 guess their view would be that there's not much physical
8 signage that would need to be changed if there were an
9 injunction, but I wanted to give you an opportunity to
10 respond to that, to see if you think, "Yes, there are these
11 big expensive signs everywhere at the airport, and it really
12 would be expensive to change those."

13 What are your thoughts about that?

14 MS. BALANDA: Yes. There are physical signs that
15 the port has ordered. They're not all installed yet, but
16 they have ordered them. They would be expensive, and, your
17 Honor, if the Court is inclined to grant an injunction, we,
18 I believe, request in our briefings a note on briefing that
19 issue of the bond amount, your Honor, to get the evidence in
20 the record about those expenditures. But yes, there are
21 signs. We're not -- you know, you can't order these massive
22 physical signs, and they show up two days later. There's
23 time. So we order, pay, and that's all in the works.

24 THE COURT: Thank you.

25 MS. BALANDA: Okay. So we've looked at the most

1 salient factors for the confusion analysis here, context,
2 how a consumer would actually move through their purchasing
3 decisions, as compared to what SFO has offered, which is
4 social media evidence that's de minimis of generalized
5 confusion.

6 And now let's talk about the other thing they offer,
7 which is a survey, and a survey can constitute
8 circumstantial evidence of actual confusion, but only if it
9 replicates the actual marketplace and the methodology is
10 sound. SFO's survey is deeply flawed, and I won't get into
11 a lot of detail on this. I think there's three main points.

12 I mean, this is discussed at length in the briefing,
13 but the stimuli was bad. The full airport name was modified
14 and used for only one out of the three presentations.
15 Southwest Airlines testified that they would never do it
16 this way, where they displayed one airport in a different
17 way than the other airports. She didn't do a test control
18 of all airport names before the change. It doesn't show
19 consumers what they would see when they click through a "buy
20 a flight."

21 Second, the survey is under-inclusive. She selectively
22 targets people from only 11 states, where potential
23 consumers are located across the country, and it doesn't
24 matter that the port has said it wants to have direct routes
25 from those states. That's not a basis to narrow the survey

1 population in that way, and she cites no authority to
2 support that.

3 Even if you could get past all of that -- so SFO says
4 they have net confusion of over 20 percent. No, they don't.
5 The survey is sort of like three kids stacked in a trench
6 coat. When you open it up, what's really there? Well, the
7 first is a question about the primary airport in the Bay
8 Area, which, on reply, they acknowledge doesn't tell us
9 anything about consumer confusion, and then they've got a
10 geographic confusion question, and that result is 9.4
11 percent, far lower than the amounts SFO have said are
12 required to be probative circumstantial evidence of
13 confusion.

14 And then they have a question on source confusion, and
15 that result is 12.4 percent, again below -- the cases SFO
16 relies upon require more than 15 percent. They cite zero
17 authority for this proposition that you can sort of stack
18 together source confusion and geographic, and net out a
19 large percentage, and it's not even that large. It's 18
20 percent.

21 So they're asking you to grant a preliminary injunction
22 based upon a survey that has nine point -- even setting
23 aside all of its flaws that is discussed in 60 pages of
24 competing expert opinion -- shows geographic confusion of
25 9.4 percent and source confusion of 12.4 percent.

1 They then argue, "Well, you should believe our survey,
2 because Oakland didn't prepare a survey." Well, we don't
3 need to. Theirs was bad, and, like I said, even if you
4 accept it all, the numbers are lower than what's required.
5 The fact we did not submit a competing survey does not
6 somehow transform Butler's (phonetic) unreliable, flawed
7 survey into reliable and probative evidence, and, in fact,
8 federal District Courts in California have routinely
9 afforded Butler's own surveys little to no weight, or
10 excluded them based upon the critiques of another expert or
11 argument alone, for example, the Theorem case, 2021 WL
12 5750238, Storage Cap Management, 2022 WL 6145532.

13 And so, your Honor, the survey, while it might be a lot
14 of paper, doesn't really offer probative information on
15 actual confusion that's relevant and reliable for the
16 Court's analysis.

17 Regarding the remaining factors, which, again, we don't
18 think are a central part of the analysis here, I'll address
19 them briefly. So the names are not sufficiently similar,
20 and this actually weighs in our favor. So similarity is
21 tested by evaluating the sight, sound, and meaning of the
22 mark in its entirety and as it's used in the marketplace.

23 SFO acknowledges this legal standard, but its argument
24 is this. San Francisco International Airport and the San
25 Francisco Bay Oakland International Airport both, quote,

1 "lead with the words San Francisco." Therefore, they're
2 confusingly similar. Start saying, "San Francisco," stop.
3 Stop right there. Close your eyes. Don't read anything
4 else.

5 Well, the Ninth Circuit has rejected that exact
6 argument. In Alpha Industries, 616 F.2d 440, the Court was
7 comparing the Alpha -- the trademark Alpha with the
8 trademark Alpha Steel. The District Court had found they
9 were not sufficiently similar, and, on appeal, the plaintiff
10 argued, "Well, the Court should have looked at the lead
11 word, and the fact that the lead word was the same," and the
12 Ninth Circuit said, "No. The marks are to be considered as
13 a whole, and as they're encountered in the marketplace."

14 On reply, SFO ignores this authority and says, "Okay.
15 Well, you can keep reading, but all of those other words
16 don't matter. It's just tack-on words. The 'bay' doesn't
17 matter." Oakland's name starts with "San Francisco Bay."
18 As we all know, it's a specific geographic feature, the body
19 of water on which the airport actually sits, yet SFO argues
20 that "San Francisco Bay" and "San Francisco" are, quote, "a
21 distinction without a difference."

22 That's the basis of their similarity argument, ECF 61,
23 at 42, that it's, quote, "semantics," pretend the city is
24 the bay, the bay is the city. Well, that's not the real
25 world. It's like saying the Panama Canal means the same

1 thing as Panama City because they both start with "Panama."
2 That's just not true.

3 THE COURT: Well, but I thought a few minutes ago
4 you acknowledged that the bay, as a body of water, is not so
5 much of importance to airline customers. It was more "the
6 Bay" as a reference to the Bay Area that would be of
7 interest to customers.

8 MS. BALANDA: Well, "the Bay" defines the region.
9 So "San Francisco Bay" is a meaningful geographic term. It
10 connotes things beyond that. It connotes the region. It's
11 the body of water around which this metropolis area is
12 built.

13 THE COURT: Well, but people don't -- like,
14 they're not going to kind of lay over at Oakland, you know,
15 go swimming in the bay. What they want is an airport that's
16 in the Bay Area. You've dropped the word "Area," I see, but
17 proximity to the water, I still don't see why that would be
18 of interest to an airline customer. It's the Bay Area that
19 they are interested in.

20 MS. BALANDA: Sure. And, I mean, I guess "San
21 Francisco Bay Area" is also distinct from and different from
22 "San Francisco." Those are three different things. And so,
23 when you're looking at similarity, again, "San Francisco" is
24 different than "the San Francisco Bay," and perhaps "San
25 Francisco Bay Area," but that's not before the Court right

1 now.

2 The name before the Court is the "San Francisco Bay,
3 Oakland," and, contrary to SFO's assertion, we did not
4 incorporate the city's name. We incorporated San -- we
5 replaced "Metropolitan" with "San Francisco Bay."

6 And not only does the airport's name begin with "San
7 Francisco Bay," it's then followed by "Oakland." SFO
8 ignores this, too, but they do affirmatively argue that city
9 names are the, quote, "dominant components of the parties'
10 respective names," ECF 61, at note three, which only
11 reinforces that the name "San Francisco Bay Oakland
12 International Airport" contains meaningful
13 source-identifying differences from "San Francisco
14 International Airport."

15 The case SFO cites in its reply to support its position
16 highlights this distinction. So they cited Detroit Athletic
17 Co., and in this case, the Court was examining the marks
18 Detroit Athletic Co. and Detroit Athletic Club, and there
19 the Court said, "Well, the extra words 'Club' and 'Co.' at
20 the end, those are generic words. They don't import
21 meaning, and so those -- they're not likely to change the
22 overall commercial impression."

23 And that's not the situation here. Our name starts
24 with a different geographic feature. The "San Francisco
25 Bay" is followed by a different city name, "Oakland," which

1 SFO itself argues is source-identifying, and then ends with
2 "International Airport."

3 And then, finally, SFO acknowledges that context
4 surrounding the names can render them even more dissimilar,
5 for example, use with a house mark, and here the record
6 shows the port does consistently use "San Francisco Bay
7 Oakland International Airport" with its "I Fly OAK" logo and
8 branding on its web site, social media, Youtube, and the
9 like.

10 So the remaining Sleekcraft factors, again, do not
11 change the result. They're not very informative. We're not
12 paying attention -- it's not that we're not paying attention
13 to them, but the Ninth Circuit has said that marketing
14 channels that overlap, it's incorrect to afford to any
15 weight in favor of plaintiff when that's the case, such as
16 here, and same thing with potential expansion, that it's
17 incorrect to afford that weight where it's not informative,
18 and that's exactly what SFO is asking this Court to do.

19 And with respect to the accusations that -- the
20 speculation -- it's not founded on any evidence, and, in
21 fact, contradicts the record evidence -- that the port sort
22 of intended to copy San Francisco, or its mark, or its name,
23 is just not true. The record evidence is strong on this
24 point, your Honor, about why the port changed the full name
25 of its airport, and I won't rehash that here.

1 So, then, turning -- in sum, your Honor, SFO has fallen
2 far short to meet their heavy burden to show they're likely
3 to prevail on the merits of their trademark infringement
4 claim, and regarding irreparable harm, yes, if they had
5 established likelihood to prevail, they would be entitled to
6 a rebuttable presumption, which, is again, is rebuttable.

7 I submit they didn't meet that burden, but, regardless,
8 the evidence in the record of what has happened since the
9 port changed the name of the airport from the Metropolitan
10 Oakland International Airport to the San Francisco Bay
11 Oakland International Airport is this, zero evidence that
12 SFO has lost any route, and instead the record shows it's
13 gained routes, zero evidence in the record that passenger
14 count has gone down. Instead, it's gone up, zero evidence
15 about any purported economic impact to SFO.

16 All the press has been positive, not one negative
17 comment about SFO, and not one comment linking Oakland to
18 SFO in a negative way. Instead, you have a self-serving
19 declaration from SFO's marketing executive saying she
20 believes SFO will suffer reputational harm. That is
21 insufficient to rebut the record evidence of SFO's positive
22 performance since May, and we cited cases on this point in
23 our opposition, your Honor.

24 And, finally, the balance of equities. Given the
25 evidence in the record that SFO's reputation and economic

1 performance have improved since the port changed the name of
2 its airport, the balance of harm favors the port. There has
3 been no harm to SFO, so the balance of equities cannot tip
4 in its favor, and we cited several cases on this point.
5 When the balance of equities -- the balance of equities
6 favors the Defendant when there's a lack of proof
7 quantifying harm that Plaintiff would suffer absent
8 preliminary relief. I'll point to you pages 24 and 25, and
9 SFO completely ignores this on their reply.

10 And then, finally, on the public interest, SFO's entire
11 argument relies upon a finding that it's likely to win on
12 the merits, which it has not shown.

13 A lot of words here, a lot of paper, your Honor.
14 Here's the key, three things. Trademark law is intended to
15 protect against mistaken purchasing decisions, not
16 generalized confusion.

17 Second, the Ninth Circuit has instructed courts are to
18 evaluate the likelihood of confusion regarding purchasing
19 decisions by focusing on the factors most important to that
20 analysis.

21 And, finally, we're here on a preliminary injunction.
22 SFO has a high burden of proof to make a clear showing that
23 it's likely to win its case, and SFO has not met that
24 burden. Thank you, your Honor.

25 THE COURT: All right. Thank you, Counsel.

1 And now let's hear from the city of Oakland about
2 whether the city of Oakland is a proper party to the motion.

3 MS. LUM: Good afternoon, your Honor. Christina
4 Lum, Deputy City Attorney for the City of Oakland, acting by
5 and through the City Council.

6 That's really important here, your Honor, and our
7 opposition, which I won't go over again, it lays out that
8 the Port of Oakland, acting by and through the Board of Port
9 Commissioners, which is a separate legislative body -- that
10 the Port of Oakland has the exclusive control and
11 jurisdiction and power and authority over the airport, and
12 we cite the charter and the ordinance, and it's explicit.
13 The word "exclusive" is explicit throughout all of these
14 legal authorities.

15 THE COURT: Let me ask you the same question I
16 asked the City of San Francisco. Suppose I were to grant a
17 preliminary injunction. To have it be fully implemented,
18 are there any city personnel who do not work for the port
19 who would need to do anything, meaning, if the injunction
20 goes only against the port, would I be missing any people?

21 MS. LUM: No. Your Honor, the charter does not
22 provide any means for the City Council to make the port, the
23 Board of Port Commissioners, do anything about the renaming.
24 I want to point out that -- so, in my brief, for example --
25 well, in this current motion for preliminary injunction, San

1 Francisco -- and in its complaint -- they point to the
2 resolution passed by the Board of Port Commissioners that
3 did the action of renaming. That's the instrument. That's
4 the legal operative thing that brought about the renaming,
5 and port resolutions, these resolutions are passed by the
6 Board of Port Commissioners only.

7 The charter says that the port has authority to do this
8 under Section 704. It does not say that the City Council
9 has to approve this, and, further, Section 712 of the city
10 charter says that City Council cannot make contracts, buy or
11 sell, or do anything to the property that belongs to the
12 port or that is encompassed in the port.

13 THE COURT: So, once the board of the port
14 approved the resolution, there wasn't any further action by
15 the City Council that was needed to give it effect, correct?

16 MS. LUM: Correct. Correct. And so there's
17 nothing in the charter, or any law or ordinance, that
18 creates a legal process, any kind of process by which the
19 City Council can make the Board of Port Commissioners act
20 one way or the other, and San Francisco has not pointed to
21 any process out there that exists. What can City Counsel do
22 to the Board of Port Commissioners to influence the renaming
23 of the Oakland Airport?

24 And I also want to address that San Francisco argued
25 that the port and the city of Oakland's separation is

1 strange, and that is just -- it's not unprecedented. I've
2 cited Hogan and Williams, which recognized that the port and
3 the city are separate entities, with separate legislative
4 bodies.

5 And then, in addition, I wanted to point out in my
6 brief, your Honor, Greyhound Lines, which recognized, for
7 example, the California Highway Patrol to be a department
8 that is separate and independent entity from the -- sorry --
9 California Highway Patrol and the -- let's see -- the
10 CalTrans, and even though they're under the same agency of
11 the Business Transportation Authority, the agency of the
12 state of California, they're two separate departments, but
13 they were recognized in Greyhound Lines to be independent
14 entities, your Honor, and different parties for that
15 lawsuit.

16 And then, as for the stipulation that San Francisco
17 referred to, that, I think, is a red herring, because that
18 stipulation would require the city of Oakland to claim some
19 kind of control over the airport and the airport renaming,
20 which is the whole point here.

21 We're arguing that we just don't have that authority,
22 and also just that, as to San Francisco's argument that the
23 city forced the issue, they served two of us, the port and
24 San Francisco, separately, and they know they served us
25 separately, and they named us separately, and then, even in

1 their complaint and their motion for summary judgment, they
2 acknowledge that it was the Board of Port Commissioners that
3 passed that resolution that they take issue with in this
4 litigation and in this motion for preliminary injunction.

5 So, in sum, the preliminary injunction here should not
6 be granted in respect to the city of Oakland acting by and
7 through the City Council, because we can't do anything. San
8 Francisco specifically, they want to enjoin and prohibit the
9 use of the name in connection with any products and services
10 in connection with this airport, to promote it, advertise,
11 offer for sale, et cetera, and, as I mentioned before, the
12 charter just doesn't provide City Council the authority to
13 give them that relief, and, again, San Francisco hasn't
14 identified a process by which City Council can do that.

15 THE COURT: If there were a monetary judgment --
16 and I realize that's not at issue today, but, if there were
17 a monetary judgment against the port, could that be
18 collected against other city assets? Since that wasn't
19 raised by the briefing, you might say that you don't know,
20 which is fair enough, but I was just wondering.

21 MS. LUM: I don't know the answer to that
22 hypothetical, your Honor. I'd have to examine the charter
23 some more. But, for a large part of what the charter says,
24 for example, the board does their own bonds, issues their
25 own bonds, and then they collect their own revenue. We have

1 different, separate city employees and port employees,
2 separate. So, as a city employee myself, my understanding
3 is that the coffers are different.

4 Let's see. And I think San Francisco mentioned that
5 the charter allows for City Council members -- City Council
6 to remove a port commissioner, and that is (indiscernible)
7 what the charter says, but that's not the relief that City
8 Council -- San Francisco wants. They want to stop the
9 renaming. Even if City Council removed a member of the
10 Board of Port Commissioners, that doesn't get them the
11 relief they want.

12 And then, practically, as to what San Francisco wants
13 in this injunction, the City Council has not taken any
14 action to advertise or market the airport in this way that
15 San Francisco wants to enjoin us to, and San Francisco has
16 not pointed to any advertising material or anything that the
17 City Council has done, and, of course, the City Council
18 actions, it's all public record. So, if there were
19 evidence, I think they could have brought it.

20 And so, for these reasons, your Honor, this Court
21 should not grant this motion as to the city of Oakland
22 acting by and through City Council. This exercise would be
23 a waste of resources, and basically the city of Oakland
24 acting by and through City Council. We have no theoretical
25 or practical way to give San Francisco the relief that they

1 want.

2 THE COURT: All right. Thank you, Counsel.

3 MS. LUM: Thank you.

4 MR. GHAJAR: Thank you for the time, your Honor.

5 THE COURT: The way I had structured it was San
6 Francisco's rebuttal on the city of Oakland issue, followed
7 by merits of preliminary injunction. Are you --

8 MR. GHAJAR: Sure. I'll let Mr. Stevens
9 address --

10 THE COURT: Okay.

11 MR. GHAJAR: Thank you.

12 THE COURT: Thank you.

13 MR. STEVENS: Thank you, your Honor. I think
14 there's just a few quick points I'd like to address. The
15 first is control over the Port Commission. The City Council
16 has control. They can remove and appoint port
17 commissioners. They need six votes to do it. So I don't
18 think it's the case that they're completely removed. If
19 they don't like what the port commissioners do, they can put
20 new port commissioners in.

21 And I wouldn't say that it's the case that we are
22 solely seeking to stop the name change. You know, the name
23 has been changed. We're seeking to change it back, and to
24 not continue to promote it, and there are people,
25 potentially, within the Oakland government that could do

1 things to say, "Our airport is called this. Call our
2 airport this." Indeed, we have seen statements from the
3 mayor in support.

4 I want to touch briefly on the Greyhound Lines case
5 that counsel mentioned. It's 213 Cal.App.4th 1129, and it's
6 correct that that case does recognize that CHP and CalTrans
7 are separate, but I think the most relevant point in the
8 case is the line -- and, excuse me, this is at page 1135 --
9 "Although the state is ultimately responsible for any torts
10 committed by its departments." And I think the analogy here
11 is, you know, the CHP and CalTrans are different, but
12 they're departments of the state, who is ultimately liable,
13 and that's the relationship we see here between the port and
14 the city.

15 You asked about assets, and I can't answer your
16 specific question, but what I can point out is there is a
17 possibility of commingling of assets. If the port has a
18 surplus of money, for example, if Air Plus (phonetic)
19 airline incomes increase dramatically, they can simply
20 transfer revenue to the city general fund, and that's 717(3)
21 of the city charter.

22 And so, with that, I'm prepared to submit, unless your
23 Honor has any further questions.

24 THE COURT: I don't. Thank you.

25 MR. STEVENS: Thank you.

1 MR. GHAJAR: One of the only new arguments I heard
2 from my colleague today that we did not have a chance to
3 address in our brief is the argument that Oakland believes
4 that the most important customers to it are its airlines and
5 businesses. That's not something they had focused on
6 previously, nor did their survey expert testify in her
7 declaration that Ms. Butler's survey, which focused on 600
8 prospective travelers, focused on the wrong set of
9 customers.

10 Respectfully, that's a silly argument to make, because
11 they didn't re-brand their airport for the few airline
12 partners and restaurants already in the airport. They did
13 it to draw an association to our airport (sic), to attract
14 more traffic, to attract more attention to the airport, and
15 that's what's happening. The new name is drawing an
16 association between their airport and ours, not to the
17 proximity to the body of water.

18 We're not alleging confusion generally. I'm well aware
19 of the case law that says that general public confusion is
20 not what the Lanham Act is concerned about, but that's not
21 what we've offered. We've offered evidence of people being
22 confused between the two airports, not just having banter
23 about it, expressing their own stories about how they ended
24 up at the wrong airport. The Lanham Act protects them, and
25 it protects us, and the good will in our 70-plus-year-old

1 brand.

2 THE COURT: One line of question I had for the
3 port was about the claim of association, and I posed the
4 question of people who use the Oakland Airport, and they
5 know that it is different from SFO, but they have a bad
6 experience, and this is something that San -- that you
7 raised in your moving papers -- and then they associate that
8 with the San Francisco International Airport. And one
9 response the port had was to say that that's not confusion
10 in connection with a purchasing decision. Do you think that
11 it is?

12 MR. GHAJAR: It actually doesn't have to be.
13 That's relevant confusion. Countless cases have safeguarded
14 brand owners' equity and good will over concerns just like
15 that, and that's a concern that I expressed earlier in the
16 argument. We don't want their rankings, experiences
17 consumers have at their airport, to reflect negatively on
18 us, and that sort of affiliation and association is exactly
19 what 1125 and 1114 under the Lanham Act, 15 U.S.C. 1114,
20 1125, protect against.

21 I would also submit to the Court that we don't want
22 travelers, Uber drivers, people returning a rental car,
23 ending up at the wrong airport due to name confusion.
24 Courts routinely credit just a few instances such as that on
25 a PI record, and here we have dozens. We don't want people

1 affiliating our airports due to name confusion. We don't
2 want people out of town or out of the country to fly to the
3 San Francisco Bay Airport, believing that they're going to
4 get on --

5 THE COURT: Sorry. Let me just back up to your
6 previous answer, to make sure I understood you.

7 Do you think that, if there's damage to the good will
8 behind the mark due to an implied association, and San
9 Francisco loses some control of its mark, the value of it
10 drops, the good will value drops because of implied
11 association -- do you think that is cognizable harm under
12 the Lanham Act even if there is no effect on airline ticket
13 sales?

14 MR. GHAJAR: The answer is yes --

15 THE COURT: Okay. Thank you.

16 MR. GHAJAR: -- and I believe that we demonstrated
17 that there is a likelihood that it has and will,
18 particularly if left unchecked, certainly result in
19 continued mistaken purchases to the wrong airport. Why
20 else, your Honor, would people be ending up at the wrong
21 airport, and rushing to get to Oakland's airport, believing
22 they had booked a ticket to San Francisco International,
23 but, in fact, they had booked it to San Francisco Bay,
24 thinking it's the same airport? And that's the type of
25 affiliation confusion that we want to avoid.

1 Moreover, your Honor said at the outset of the
2 hearing -- there's another type of confusion that I didn't
3 really hear addressed in my colleague's argument. That's
4 initial interest confusion. The whole doctrine of initial
5 interest confusion presupposes that there's not a purchase.
6 So the Lanham Act is concerned with either people making and
7 consummating a purchase mistakenly.

8 There's post-purchase confusion, there's pre-purchase
9 confusion, and there's confusion on the part of people who
10 influence decisions, and here it's too myopic, we would
11 submit, to focus only on someone who goes on five web sites
12 in the handout, and not the myriad others, and the OTA
13 (phonetic) web sites, and to ignore that there are different
14 ways that people are affected to then make purchasing
15 decisions.

16 For example, when somebody does research, they go on
17 Google. They search up "San Francisco Airport." They end
18 up on Oakland's web site and they don't know the difference,
19 because they don't know the Bay Area, and then they end up
20 buying tickets to that airport. That type of confusion
21 early on, in any step of the process, is actionable. The
22 Lanham Act doesn't concern itself only when somebody has
23 bought the wrong brand of car or the wrong airline ticket.

24 A few more words. Counsel suggested early in the
25 argument that people may want to look up the San Francisco

1 Bay to see where it is, and that was perhaps an impetus
2 behind a name change. If that was a concern or hypothesis,
3 those same people could just go on a map and search for the
4 city of Oakland. So that didn't seem to be an argument that
5 really went anywhere.

6 Counsel confirmed something that I think is pretty
7 important. The new name -- and your Honor alluded to
8 this -- replaced an old brand, the old source identifier.
9 This isn't just a brushed-aside name. They're doing this
10 for a reason. San Francisco Bay Oakland International
11 Airport is their new brand, and they want everybody to
12 associate that brand with them. It's not just a buried name
13 that is not serving as a source identifier. It is serving
14 the exact same purposes of their old registered trademark.

15 We, on the other hand, own "San Francisco" in
16 connection with an airport. That's what our trademark
17 registration, which is incontestable, gives us. I said it
18 earlier. That registration is meaningless if Oakland can
19 adopt every word in our registered trademark in its new
20 name.

21 My colleague highlighted IATA codes. I believe that
22 your Honor and I discussed that earlier, but what evidence
23 is there in Oakland's papers that consumers understood IATA
24 codes or that affects their understanding of whether one
25 airport is affiliated or associated with another? It does

1 none.

2 And a brief word about the survey. Ms. Butler's survey
3 is unrebutted by a contrary survey. Doctor Scott (phonetic)
4 doesn't criticize Ms. Butler's bona fides, doesn't criticize
5 her first question, doesn't -- criticizes her stimuli, but,
6 your Honor, she designed the survey before Oakland had
7 rolled out the name. She had to create a simulation of what
8 it might look like if the new name appeared on a drop-down
9 menu.

10 It doesn't matter if she had made up an airline.
11 That's what surveys do. They try to simulate a real-world
12 simulation, and, at the time -- and she explains this in her
13 rebuttal declaration -- that is what she decided to do, and
14 she's done in other cases, and she's done it in another case
15 that's before your Honor, and that's in reply papers, and
16 that's the Wex case.

17 And I'll close with two points, one about the Wex case
18 and one about economic impact. In the Wex case -- it's a
19 District of Maine decision from a few months ago -- the
20 Court enjoined HP, Hewlett Packard's, use of "HP Wex." Now,
21 one would think that the powerful, famous HP brand and
22 branding that appear alongside the Wex name would dispel
23 confusion. Not so.

24 Ms. Butler did a survey in that case, finding over 20
25 percent confusion. The Court definitely credited that, and,

1 notwithstanding HP's arguments, much like Oakland's here,
2 that there were other indicia along and in the name that
3 should dispel confusion, the Court issued an injunction,
4 finding that when spoken in certain context the names are
5 "Wex." The names are too similar.

6 And that's notwithstanding the fact that, in that case,
7 the consumers were highly sophisticated. These were
8 software platforms. They cost a lot of money, and you could
9 only consume them by going to those web sites. It's not
10 like here, where you have OTAs and apps and whatnot.

11 And then, finally, there was a discussion about the
12 lack of, what I understood counsel to be arguing, an
13 economic impact on San Francisco. Well, there will be a
14 time and place to assess that, but that's not what a PI is
15 about. In fact, we're talking about incompensable harm.

16 We're talking about harm to our reputation and good
17 will that you can't put a price tag on, and before those
18 signs that apparently are on their way to Oakland Airport
19 that haven't been delivered are put up, and before other
20 airlines adopt this infringing name and create enough more
21 confusion, we ask that your Honor issue an injunction
22 preventing that from happening further. Thank you.

23 THE COURT: All right. Thank you, Counsel.

24 The matter is submitted, and I will issue a written
25 order.

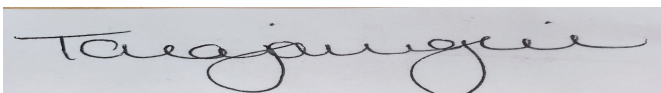
1 THE CLERK: Thank you, everyone. We're off the
2 record in this matter, and court is in recess.

3 (Proceedings adjourned at 2:54 p.m.)
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CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

A handwritten signature in black ink, appearing to read "Tara Jungi", is centered on a light gray rectangular background.

Echo Reporting, Inc., Transcriber

Saturday, November 9, 2024

1 COOLEY LLP
BOBBY GHAJAR (198719)
2 JOHN HEMANN (165823)
JUDD LAUTER (290945)
3 3 Embarcadero, 20th Floor
San Francisco, California 94111-4004
4 Telephone: (415) 693-2000
Facsimile: (415) 693-2222
5 Email: bghajar@cooley.com
jhemann@cooley.com
6 jlauter@cooley.com

7 DAVID CHIU (189542)
City Attorney
8 JESSE SMITH (122517)
Chief Assistant City Attorney
9 YVONNE R. MERÉ (173594)
Chief Deputy City Attorney
10 JULIE VEIT (209207)
CHRISTOPHER STUART (262399)
11 Deputy City Attorneys
City Hall
12 1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
13 Telephone: (415) 554-4700
Facsimile: (415) 554-4757
14 Email: Cityattorney@sfcityatty.org
Jesse.Smith@sfcityatty.org
15 Yvonne.Mere@sfcityatty.org
Julie.Veit@sfcityatty.org
16 Christopher.Stuart@sfcityatty.org

17 Attorneys for Plaintiff and Counterclaim Defendant
18 CITY AND COUNTY OF SAN FRANCISCO

19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA
21 SAN FRANCISCO DIVISION

22 CITY AND COUNTY OF SAN FRANCISCO,

23 Plaintiff,

24 v.

25 CITY OF OAKLAND AND PORT OF
26 OAKLAND,

27 Defendants.

28 AND RELATED COUNTERCLAIM

Case No. 3:24-CV-02311-TSH

**SECOND DECLARATION OF JESSICA
WILLIAMS IN SUPPORT OF THE CITY'S
MOTION FOR PRELIMINARY INJUNCTION**

1 I, Jessica Williams, declare as follows:

2 1. I am an associate with the law firm Cooley LLP, counsel for Plaintiff in this matter.
3 I submit this declaration in connection with the City and County of San Francisco's Reply Brief in
4 Support of Plaintiff City and County of San Francisco's Motion for Preliminary Injunction
5 Enjoining Defendants. I declare that the following is true to the best of my knowledge, information,
6 and belief, and that if called upon to testify, I could and would testify to the following.

7 **Disclaimers in the Parties' Registrations**

8 2. As stated in my previous declaration, in or around September 9, 2024, I conducted
9 a search of the U.S. Patent & Trademark Office ("USPTO") records for information regarding the
10 efforts of Defendants, City of Oakland and Port of Oakland, to register the OAKLAND
11 INTERNATIONAL AIRPORT trademark. A review of the registration certificate for this
12 trademark, attached as Exhibit H to my previous declaration, shows that Oakland disclaimed
13 trademark rights to the terms "INTERNATIONAL AIRPORT." No disclaimer of "OAKLAND"
14 is present in the registration.

15 3. As stated in my previous declaration, in or around September 16, 2024, I conducted
16 a search of the USPTO records for information regarding Plaintiff's application to register the SAN
17 FRANCISCO INTERNATIONAL AIRPORT trademark. A review of the registration certificate
18 for this trademark, attached as Exhibit E to my previous declaration, shows that Plaintiff likewise
19 disclaimed rights in "INTERNATIONAL AIRPORT." No disclaimer of "SAN FRANCISCO" is
20 present in the registration.

21 **Additional Evidence of Consumer Confusion**

22 4. In or around October 1, 2024, I reviewed the comments section of a video "San
23 Francisco Bay Area or LA" comedian Joy Ofodu posted on Instagram on September 24, 2024. In
24 the video, Ofodu reacts to an offscreen voice informing her of the Oakland airport name change to
25 "San Francisco Bay Oakland International Airport." The caption to this video reads, in relevant
26 part: "Sorry, it's still the Oakland airport 😂 do not have these international travelers landing out
27 here, confused" and "ALT IMG: a woman, with a slight hint of angst underneath her aura, rules of
28 her suitcase to an off screen attendant outside of What is still very much the Oakland airport."

1 Reviewing the comments to this post, I observed several instances of apparent consumer confusion
2 either experienced or witnessed by a commentor. I captured a screenshot of the comments section
3 and have attached the relevant excerpts hereto as **Exhibit DD**.

4 5. For example, one Instagram user, @j_matteo, commented, “. . . Dreamforce just
5 ended in San Francisco, with a number of people flying to the wrong airport as a result. . . .”

6 6. Another Instagram user @lindsey514 wrote about witnessing others’ confusion
7 resulting from the name change: “. . . it’s so confusing. I’ve already seen people missing their flight
8 because they go to SFO 😞”.

9 7. An airline employee commented from their personal account, @najma_nejwa, to
10 describe an experience with a customer who asked for their assistance checking a bag. Eventually,
11 the user “had to use other means to find out in the end she’s HEADING TO OAK which is Oakland
12 not SFO San Francisco and I was like your [sic] heading to Oakland not sfo and she argued I was
13 like you need to know it’s called Oakland and there’s already sfo so don’t confuse me and go your
14 way and make sure you tell other agents Oakland not sfo to confuse us and your self and don’t miss
15 your flight as it will [sic] Oakland not SFO.”

16 8. Another user, @dr_tameka, did not appear to be personally confused, but
17 commented about concerns over confusion by out-of-towners: “No, it needs to be Oakland, because
18 out of town folks are often confused with San Francisco (SFO) and the new San Fran Oakland
19 Airport (OAK).” This comment caught my attention as it demonstrates that even those familiar
20 with the name change will not include the term “Bay” in reciting the new name.

21 9. Commenting on their own confusion, user @chris.tine2011 wrote, “That’s why I
22 got so confused I I was like no, Oakland airport on google but it kept pulling up like that.” This
23 comment caught my attention as it appears to demonstrate a situation where it was only because of
24 the person’s familiarity with their destination that they knew to override the Google search result.

25 10. User @empowers.souls comments about their apparent observation of confusion by
26 ride share drivers: “**Crazy thing - ever since they changed it Uber & Lyfts have been going to**
27 **the wrong airport.**” (emphasis added).

28 11. @danielphantOm wrote about the confusion of others: “Oh yeah the name change

1 that had a bunch of people wind up landing at the wrong airport lol”.

2 12. I also observed Instagram users discussing confusion in the comments section of
3 posts about the name change, too. For example, when @rootedrachelraeray wrote, “Nobody has
4 time for that long as [sic] name and they’re going to confuse tourists into thinking they’re in San
5 Francisco too. Watch 😞,” to which user @velveteenvoyager responded, “**already happened a
6 few times!**” (emphasis added).

7 13. Another user, @yodeleofficial, described their confusing experience in the
8 comments section: “They def doing too much. That’s how I almost missed my flight going to the
9 wrong airport”.

10 14. User @Sabrina47lewis recalled some else’s confusion, too: “Didn’t somebody just
11 missed their plane because of the name change of the airport I went to the wrong airport”.

12 15. User @mankeme.nahui commented that, apparently because of the name change,
13 “This would explain why u went to the wrong fkn airport.”
14

15 Executed on this 21st day of October, 2024, at Los Angeles, California.
16


17 
18 Jessica Williams
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EXHIBIT DD

Instagram

Home

Search

Explore

Reels

Messages

Notifications

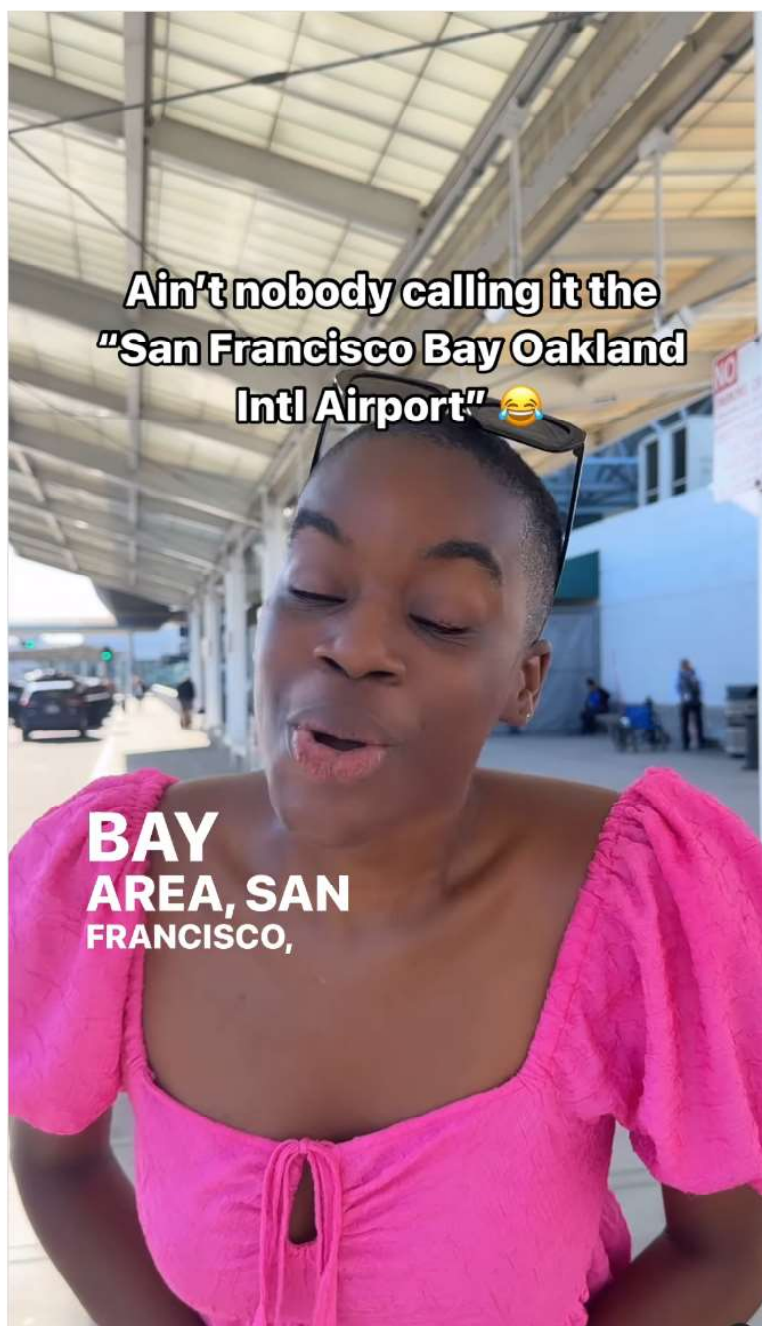
Create

Profile

AI Studio

Threads

More

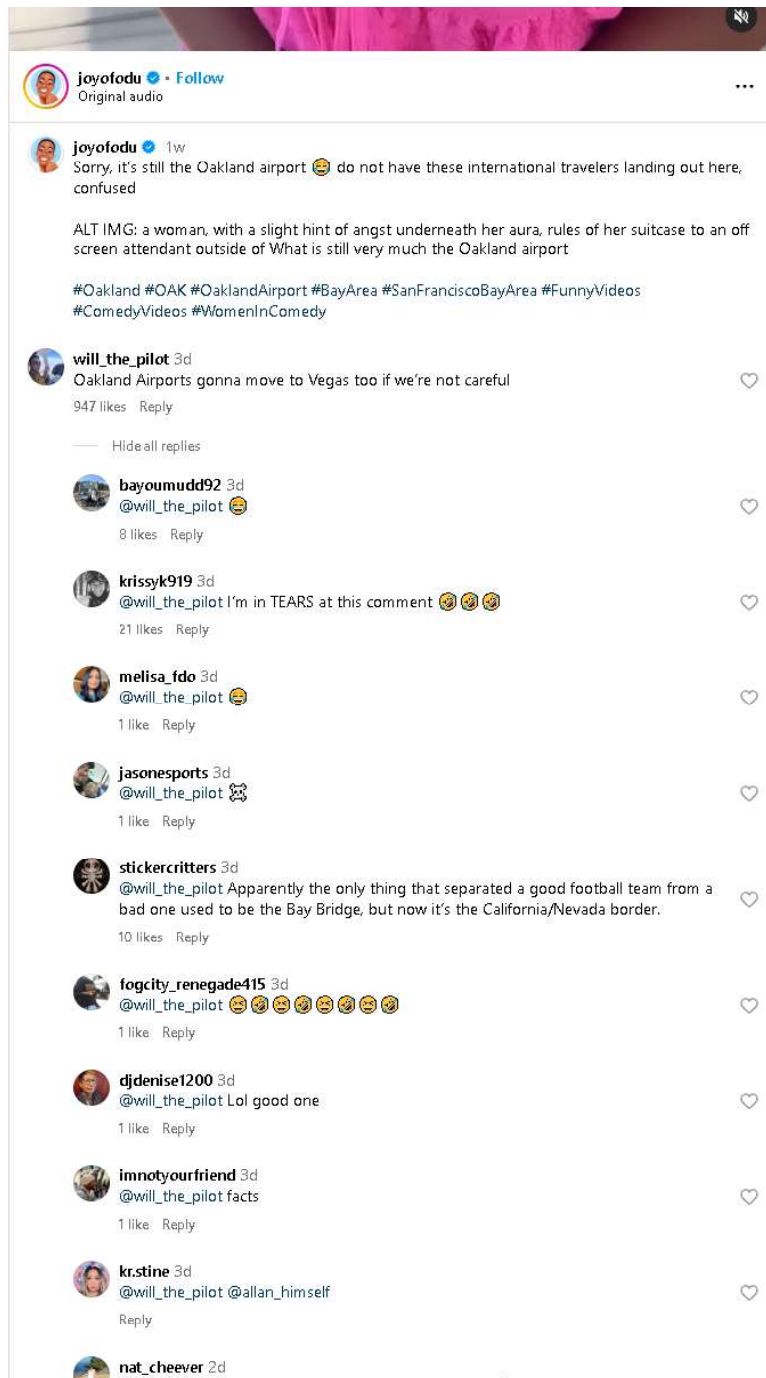


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Timestamp

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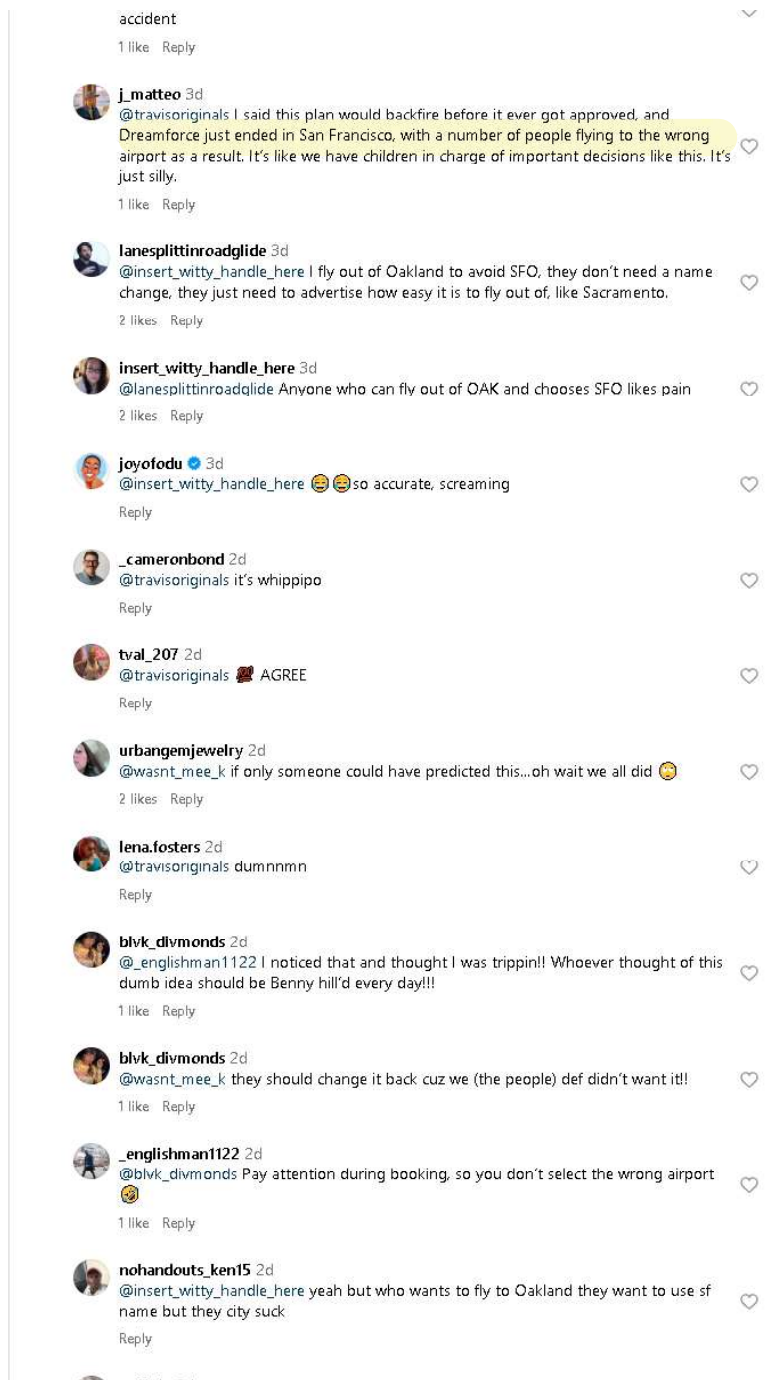


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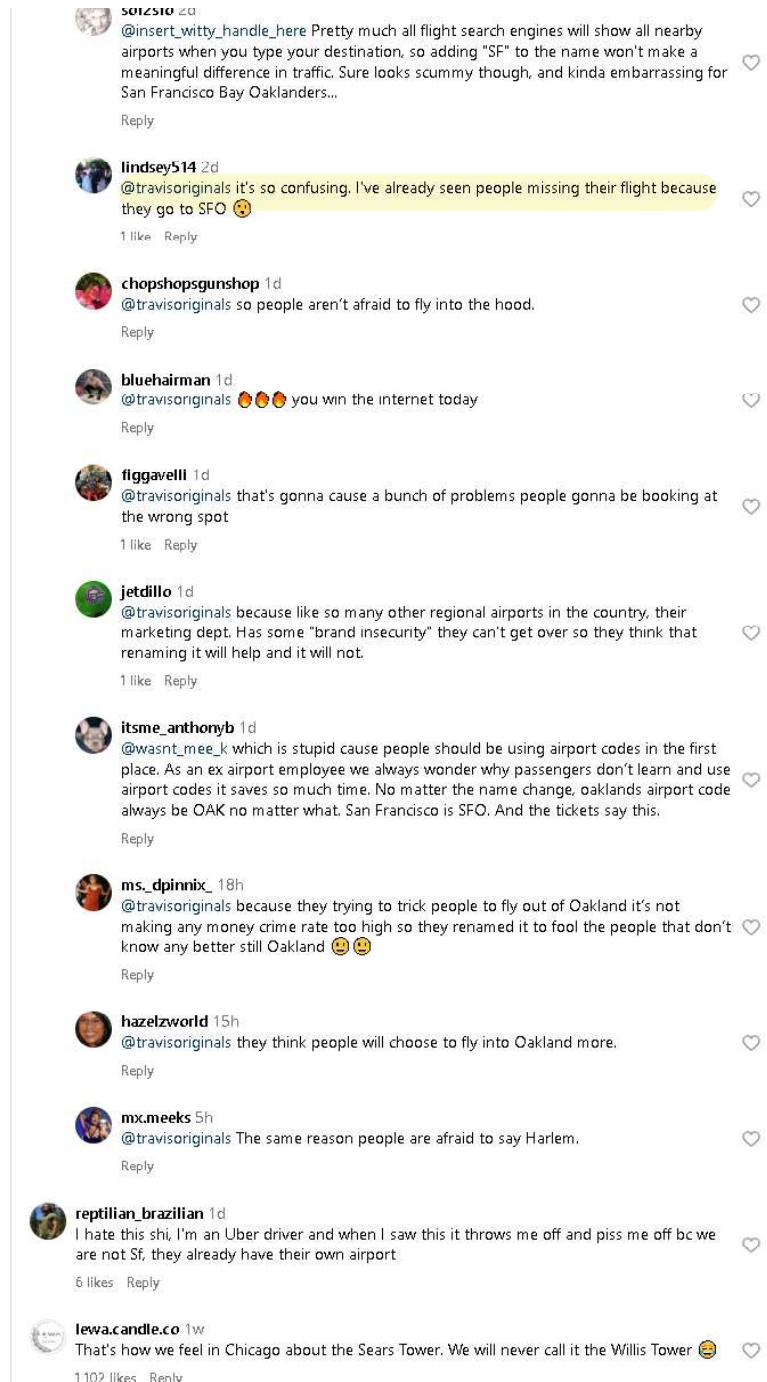


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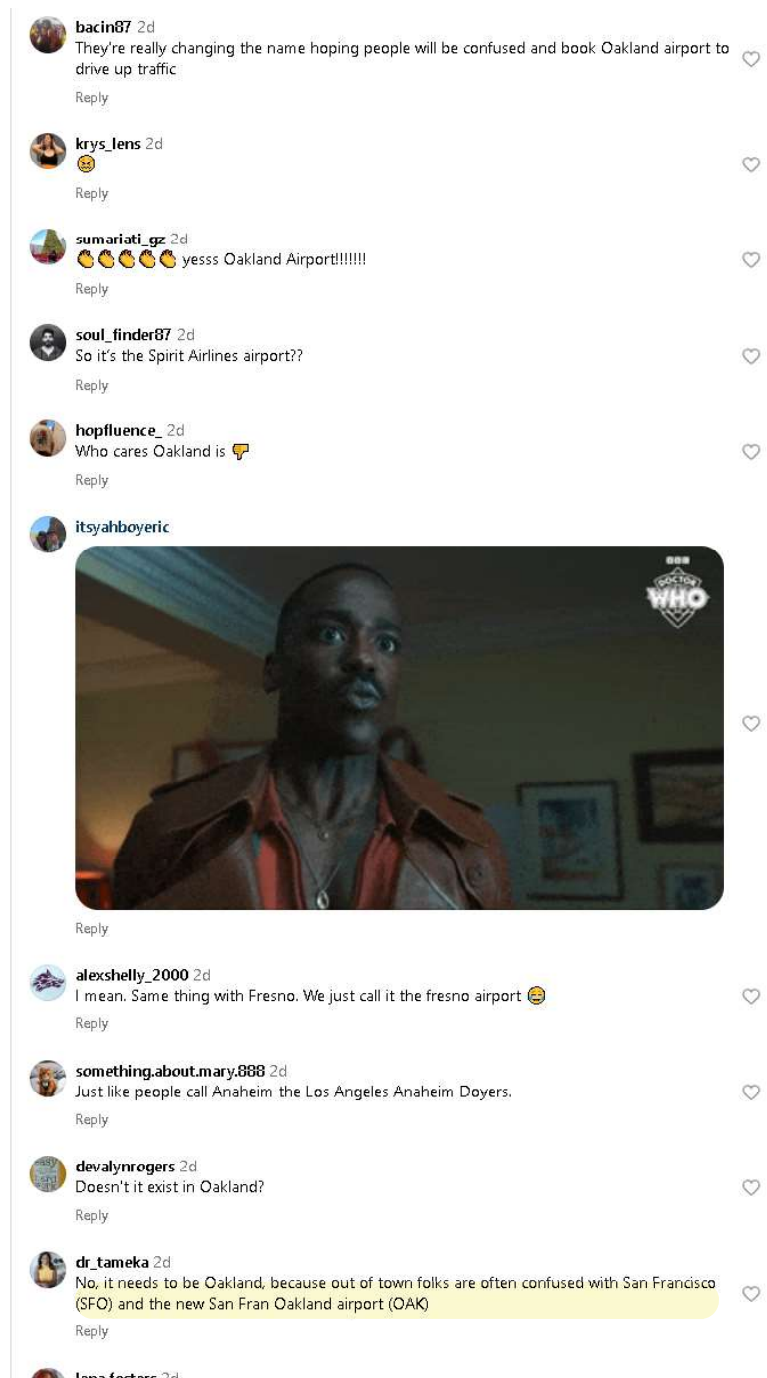
	william_tha_conqueror 3d So is it also called San Francisco Bay San Jose airport? Reply	
	bowlernme 3d Isn't the airport code still OAK? Reply	
	anxcarch 3d It's still literally "OAK" right? Reply	
	anxcarch 3d  Reply	
	mr_gasper510 3d So San Francisco has 2 airports? Reply	
	clue78 3d OAK 4 ever Reply	
	jasonesports 3d WTF they didn't change it ahaha whatttt Reply	
	najma_nejwa 3d As I work with the airline a passenger said this I'm heading to San Francisco so can you check me I was like sure gimme your ID I pull up SFO flights on that day be hold I couldn't find the pax so I was like are you sure your in right date and right airline she said yes then I had to use other means to find out in the end she's HEADING TO OAK which is Oakland not SFO San Francisco and I was like your heading to Oakland not sfo and she argued I was like you need to know it's called Oakland and there's already sfo so don't confuse me and go your way make sure you tell other agents Oakland not sfo to confuse us and your self and don't miss your flight as it will Oakland not SFO. Bye we appreciate the business. Reply	
	jacalynjaci 3d Exactly it's the Oak Airport Reply	
	jasminfb 3d Facts, no one in the Town has time for that long ass title 🤔 Reply	
	caligrri 3d  Agreed Reply	
	mspeachz1 3d I had to go look that up . 😊😊😊 Reply	
	kaaaayilllaaaaa 3d @yourfavoriteaddiction Reply	

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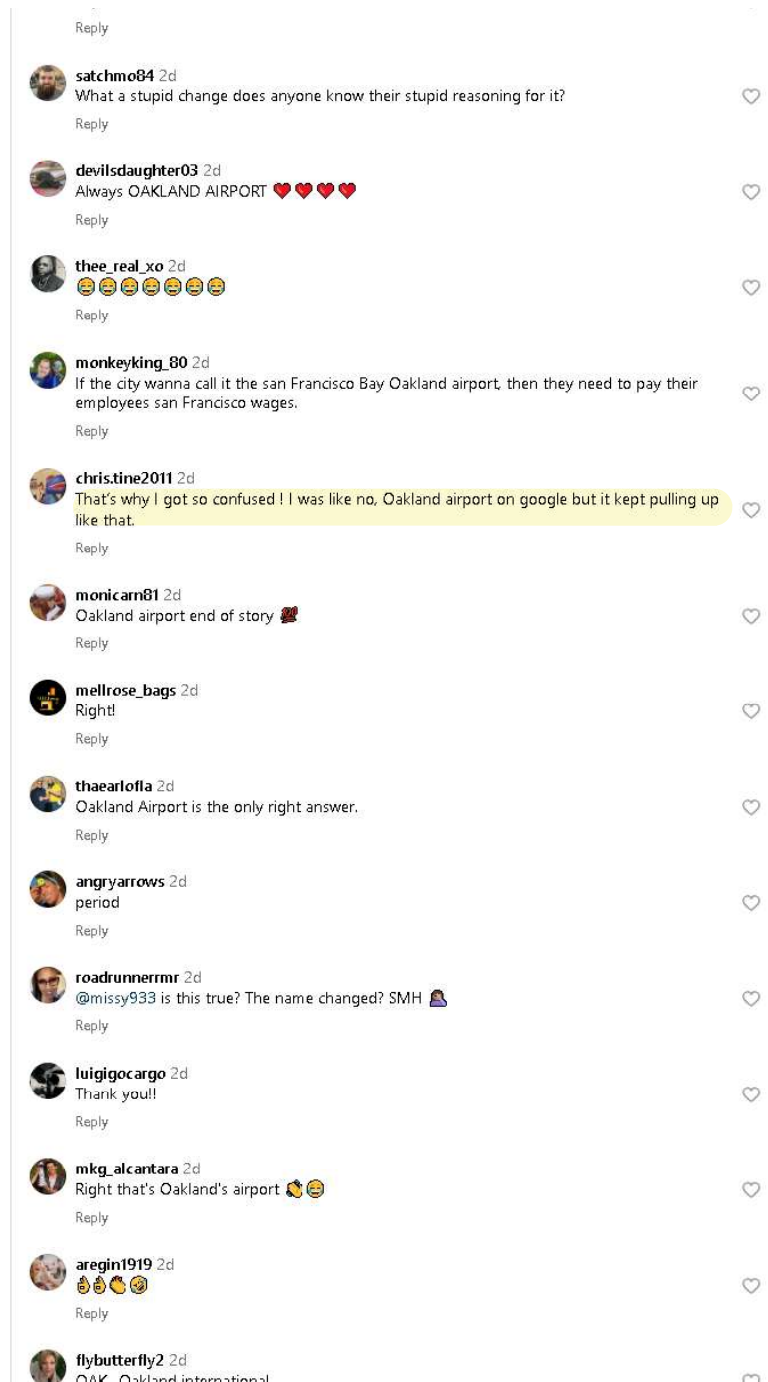


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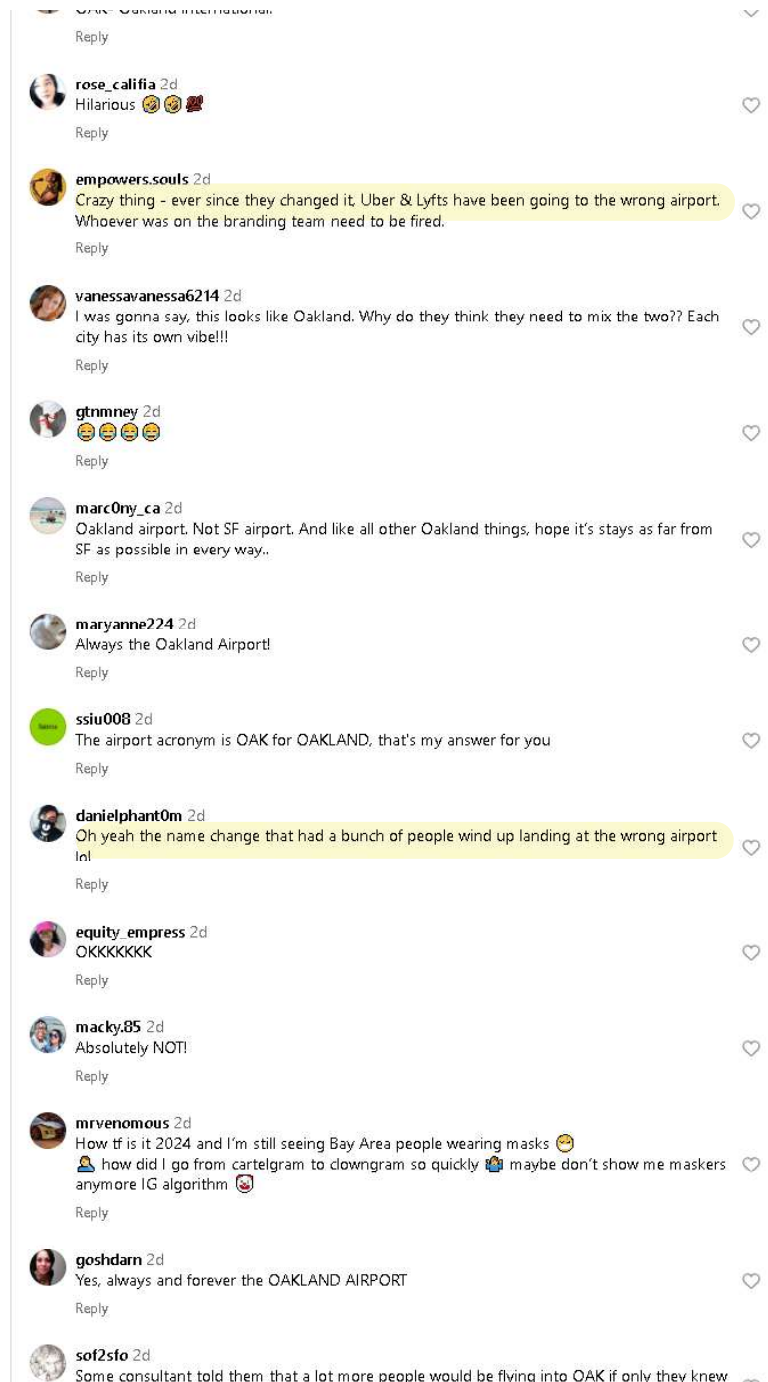


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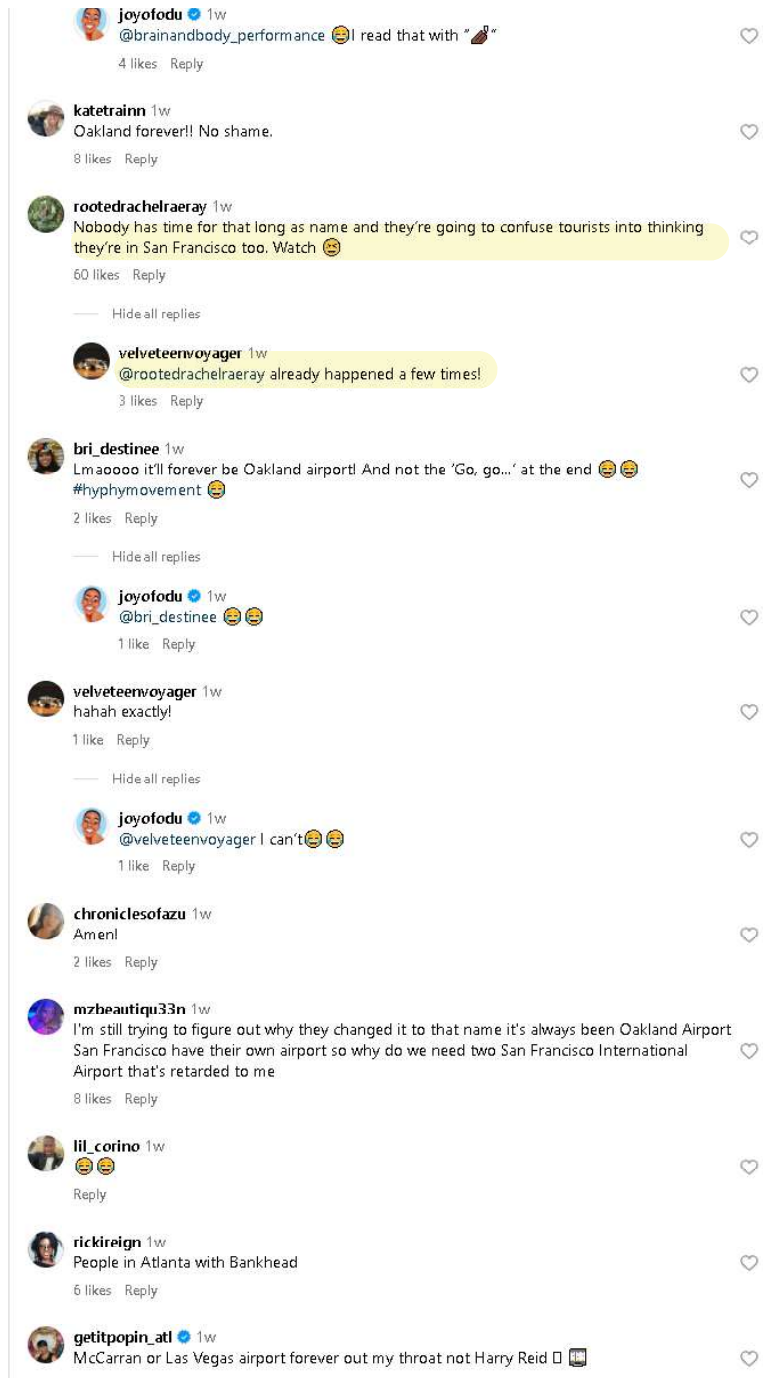


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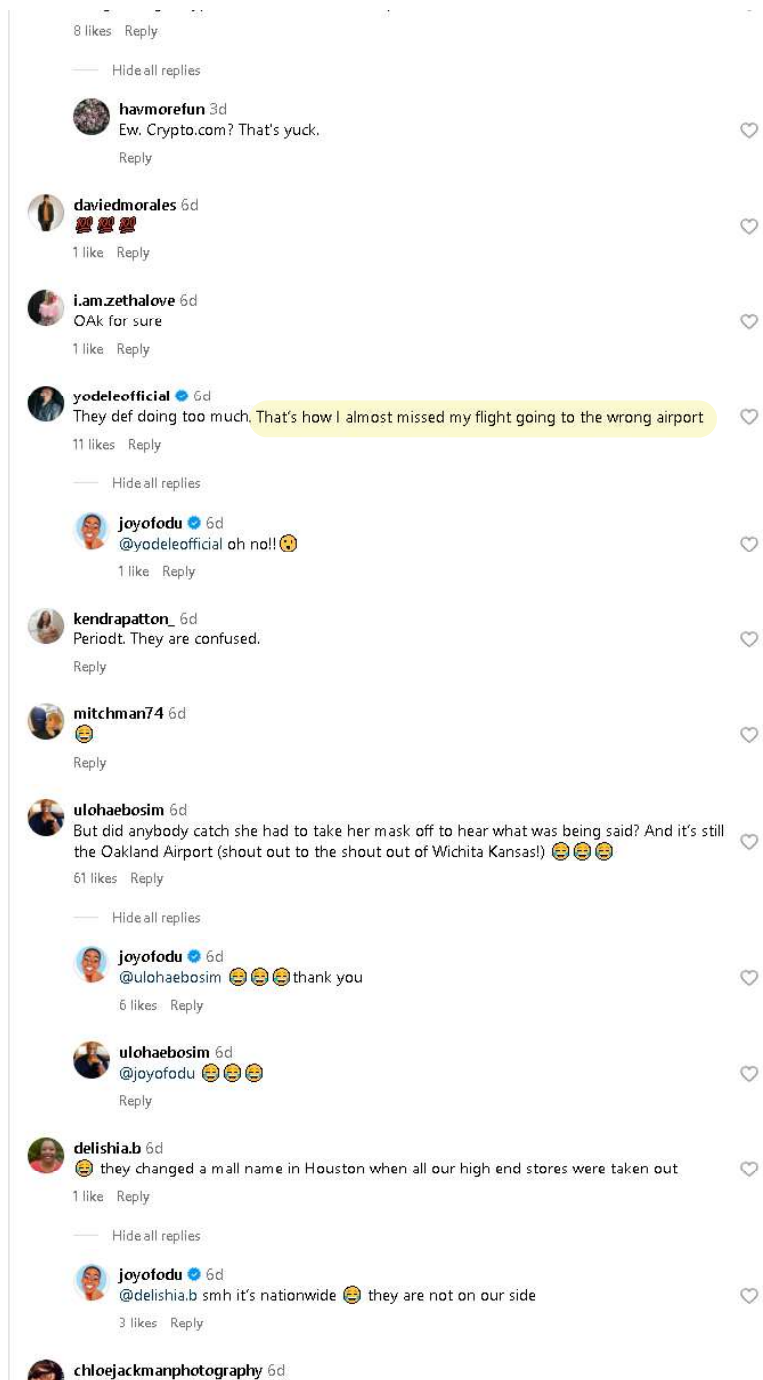


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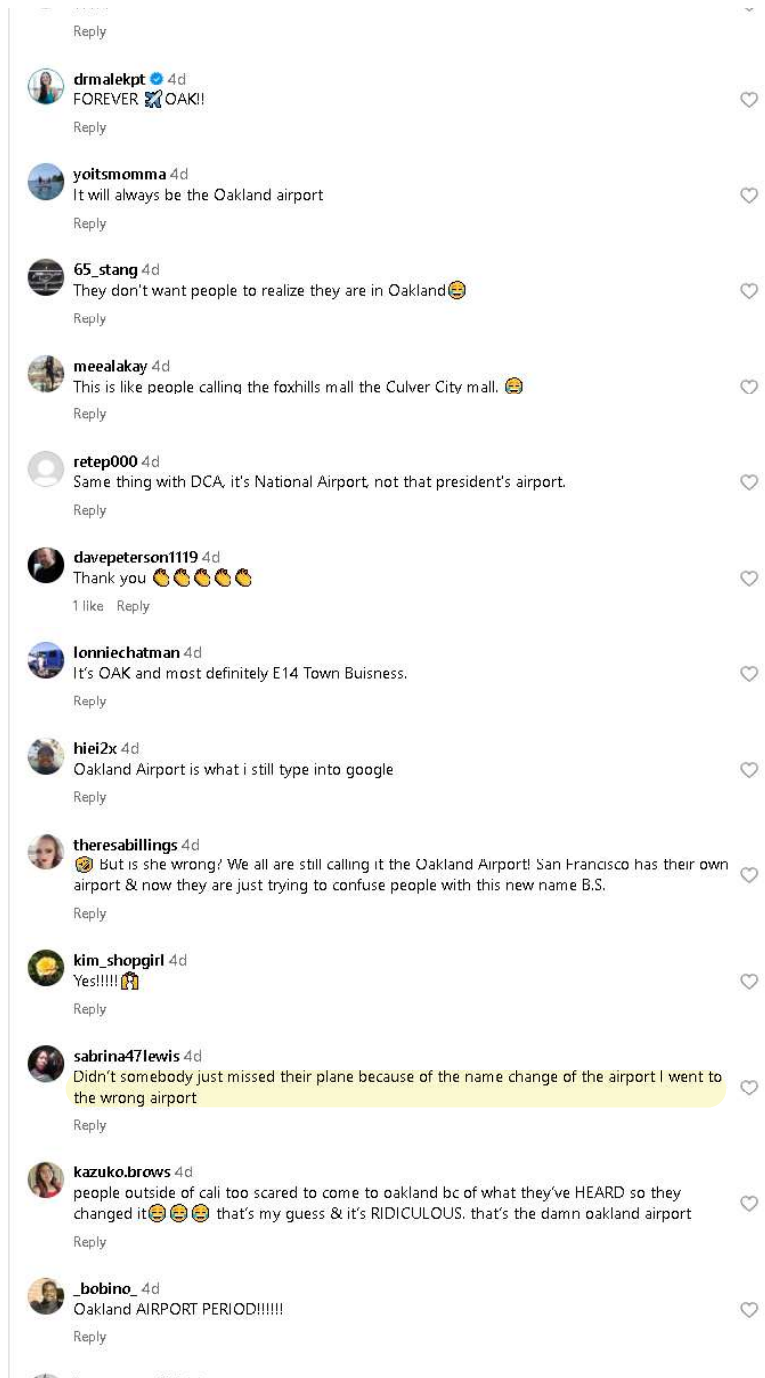


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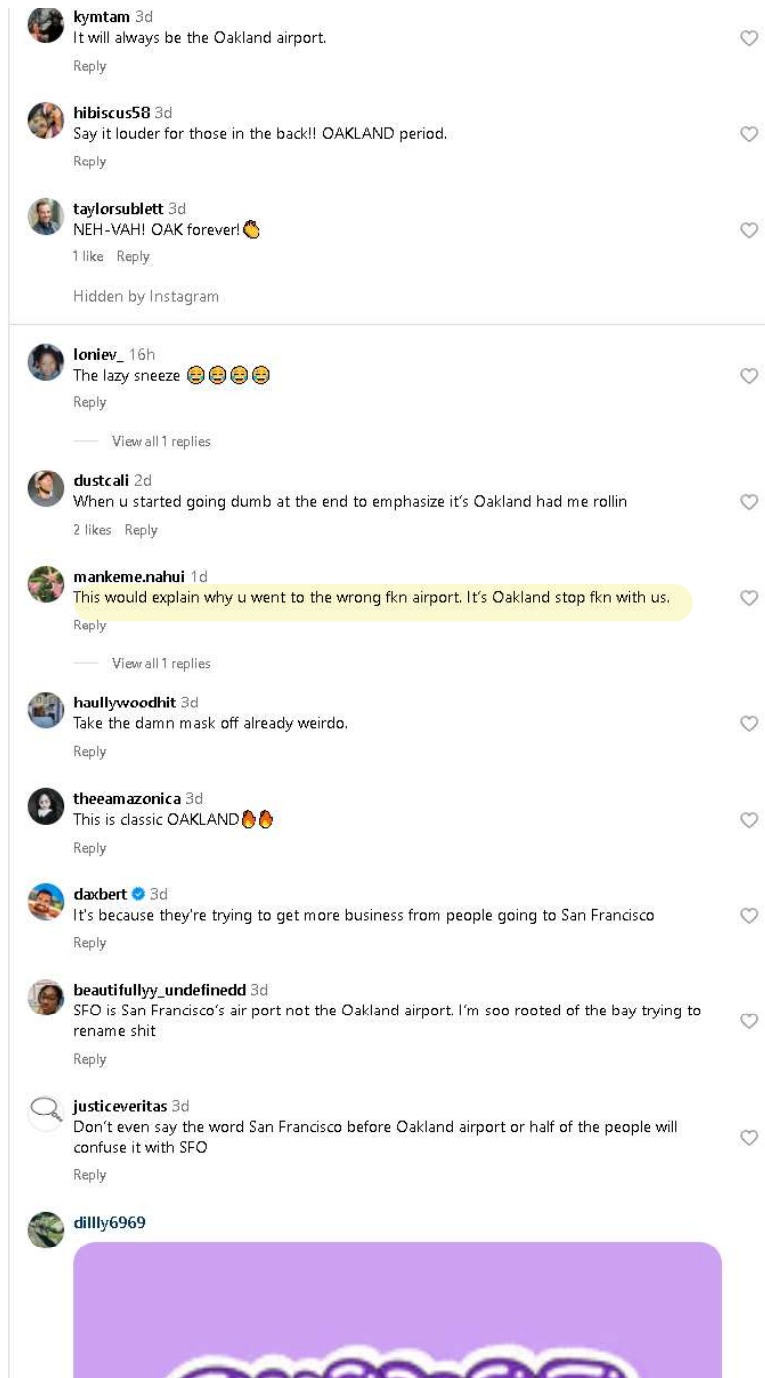


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Timestamp

Tue Oct 01 2024 13:29:06 GMT-0700 (Pacific Daylight Time)

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CITY AND COUNTY OF SAN
FRANCISCO,

Plaintiff,

vs.

CITY OF OAKLAND, AND PORT OF
OAKLAND

Defendant.

CITY OF OAKLAND, A MUNICIPAL
CORPORATION, ACTING BY AND
THROUGH ITS BOARD OF PORT
COMMISSIONERS (PORT OF
OAKLAND),

Counterclaimant,

vs.

CITY AND COUNTY OF SAN
FRANCISCO

Counterclaim Defendants.

Case No.: 3:24-cv-02311-TSH

REPLY REPORT OF SARAH BUTLER

REPLY REPORT OF SARAH BUTLER

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I. QUALIFICATIONS

1. I am the same Sarah Butler who submitted an expert report in this matter.¹
2. NERA is being compensated for my services in this matter at my standard rate of \$825 per hour. Members of the staff at NERA have worked at my direction to assist me in this engagement. No part of my compensation or NERA's compensation depends on the outcome of this litigation. Throughout this report, I have used the terms "I" and "my" to refer to work performed by me and/or others under my direction.

II. DOCUMENTS REVIEWED

3. As part of my work, I reviewed the declaration submitted by Dr. Carol A. Scott.² A list of the specific materials I reviewed and relied upon for this report can be found in **Exhibit B**.

III. SUMMARY OF OPINIONS

4. In their response to Plaintiffs' Motion for Preliminary Injunction, Defendants hired Dr. Carol A. Scott to respond to my survey. Dr. Scott did not conduct her own survey. In her report, Dr. Scott mischaracterizes and misrepresents the survey I designed. Dr. Scott focuses much of her report on the population included in my survey and the particular versions of webpages shown to respondents. Dr. Scott claims my survey under-represents Oakland International Airport's "current" market and she bases this criticism on the state of residence for my survey respondents. While I did sample respondents from states that Oakland International Airport suggested it would target with its name change, respondents were not screened out on a basis of their current awareness of, or familiarity with, Oakland International Airport or San Francisco International

¹ Declaration of Sarah Butler in Support of the City's Motion for Preliminary Injunction, dated September 10, 2024 (hereinafter, "*Butler Declaration*").

² Declaration of Dr. Carol A. Scott, dated October 8, 2024 (hereinafter, "*Scott Declaration*").

Airport. In fact, I designed the survey to ensure that half of my respondents have previously traveled by air to Northern California (including those who have flown to San Francisco International Airport, Oakland International Airport, or both). Moreover, surveying both past and prospective purchasers is appropriate for a likelihood of confusion survey.³ Dr. Scott presents no data to demonstrate that some other set of states would have yielded different results and ignores my data demonstrating that even consumers who have previously traveled to Northern California (again including those who have previously flown to Oakland International Airport and San Francisco International Airport) were confused by the name San Francisco Bay Oakland International Airport.

5. Further, to ensure that my survey represented a range of possible ways in which consumers might encounter the name, I tested two different platforms which realistically depicted the appearance of “San Francisco Bay Oakland International Airport.” While Dr. Scott does not generally take issue with showing respondents results from searches for flights to the Bay Area, Dr. Scott does criticize the specific stimuli shown and argues that these platforms currently do not display (or would never display at all) Oakland International Airport’s new name. But these arguments are irrelevant as my survey was not testing whether Southwest or Google Flights, specifically, cause consumers to be confused. My survey appropriately tested whether Oakland Airport’s new name “San Francisco Bay Oakland International Airport,” when appearing in a realistic manner, causes confusion. Respondents in my survey were shown realistic depictions of the name, similar to the manner in which names are displayed in other locations with multiple airports (e.g., New York or Washington, D.C.). Moreover, because Oakland International Airport

³ Diamond, S. S. (2011). “Reference Guide on Survey Research,” Reference Manual on Scientific Evidence, Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence; Federal Judicial Center; National Research Council, pp. 359-423 at p. 239.

only implemented the name change in early May of 2024,⁴ it is impossible to know how precisely each website or platform will display the name.

6. Dr. Scott also claims that asking respondents about the primary airport is inappropriate because it does not provide data as to the geographic location or identity of the airport. Of course, my survey includes a question to determine where respondents believe the San Francisco Bay Oakland International Airport is located and whether they believe this airport is the San Francisco International Airport. Dr. Scott ignores the fact that my survey demonstrates a net confusion rate of 18.5 percent without including results from the question about the “primary” airport.

7. Finally, throughout her report, Dr. Scott offers numerous theories and hypotheses as to different rates of confusion, but she has no data to support these theories, has not conducted her own survey, and provides no evidence that any alternative set of questions or stimuli would have achieved different results. In total, Dr. Scott offers criticisms that incorrectly characterize the appropriate survey population and stimuli used in my survey, and she ignores data presented throughout my original report that contradict her conclusions.

8. My detailed response to Dr. Scott is below.

IV. RESPONSE TO SCOTT DECLARATION

A. The Survey Targeted the Relevant Universe of Consumers

9. Dr. Scott claims that my sample is under-inclusive and does not include markets that currently account for the largest number of Oakland passengers.⁵ For a number of reasons, Dr.

⁴ <https://www.cnn.com/2024/05/10/travel/oakland-airport-name-lawsuit-san-francisco/index.html>, last accessed October 21, 2024.

⁵ *Scott Declaration*, ¶ 8.

Scott's criticisms are without merit, and she ignores facts and data relevant to the claims in this matter.

10. First, Dr. Scott's criticism depends on the relevant survey population being that which encompasses Oakland International Airport's "current" markets. In this case, it was important to survey relevant consumers (i.e., those who have or will travel to Northern California by air) in areas where Oakland International Airport itself has suggested its name change will have an impact. Many documents indicate that Oakland International Airport's name change is driven by the desire to solicit passengers from markets it currently does not reach. For example, a March 2024 article by Aviation Week indicated that the name change is "part of efforts to increase geographic awareness among inbound travelers."⁶ The article goes on to quote Oakland's mayor, who stated, "Considering a name modification to highlight our location within the vibrant San Francisco Bay Area could offer several benefits. ... Notably, it could support the airport's efforts to secure more direct flights to additional destinations, enhancing convenience for travelers and potentially boosting tourism in Oakland."⁷ An April 2024 study commissioned by the Port of Oakland posed this information to local consumers about the reasons for a name change:

Here is a bit more information. Oakland International Airport is limited in its ability to have airlines offer more flights to international and domestic destinations in the Midwest, the South, and the East Coast, despite demand from outbound Bay Area-based customers. This is due to a lack of demand from inbound passengers from other parts of the country. Many international and domestic passengers that don't live in the Bay Area are unfamiliar with Oakland International Airport and its location. Oakland International Airport has already lost flights and destinations because of this issue. A new name would allow Oakland International Airport to attract more passengers and add more domestic and international flights and destinations to the airport."⁸

⁶ See, e.g., "Oakland Airport Seeks To Boost Inbound Traffic with Name Change," <https://aviationweek.com/air-transport/airports-networks/oakland-airport-seeks-boost-inbound-traffic-name-change>, last accessed October 21, 2024.

⁷ *Ibid.*

⁸ OAK-Branding-Survey-Key-Findings.pdf, p. 2, *emphasis added*.

11. Press releases from the Port of Oakland indicated that the name change is intended to “boost inbound travelers’ geographic awareness of the airport’s location,”⁹ and reported that the proposed name change was supported by research demonstrating Oakland International Airport’s inability to sustain new routes due to travelers’ “lack of geographic awareness.”¹⁰ The Port of Oakland’s Agenda Report from April 11, 2024, described background reasoning for name change as follows:

However, the further away travelers are from the San Francisco Bay Area region, the less familiar they are with OAK’s geographic location and convenience of access to destinations throughout all Northern California.¹¹

12. These materials suggest that Oakland International Airport intended its name change to target individuals unfamiliar with Oakland and its location, and/or consumers who are in markets far from the Bay Area (e.g. Midwest, East Coast, the South). Therefore, despite Dr. Scott’s claims that a survey of over 600 consumers from eleven states¹² represents only a “small portion of relevant consumers searching for flights to Northern California who potentially would be exposed to the new name during a search,” comments from Oakland International Airport suggest that the name change is specifically directed to those who do not know Oakland and who have not traveled to the Bay Area.¹³

13. Despite Oakland International Airport’s targeting of consumers unfamiliar with the Bay Area, my survey did not target or seek to include only consumers unfamiliar with Oakland or its location. In fact, I designed the survey to ensure that half of my sampled respondents were

⁹ 2024-03-29 Port Press Release.pdf.

¹⁰ Agenda Report.pdf, p. 1.

¹¹ *Ibid.*

¹² This includes Washington, D.C.

¹³ Dr. Scott does not demonstrate that consumers from Los Angeles or San Diego, for example, would use general search terms, such as “Bay Area” or “Northern California” when looking for flights.

consumers who have traveled to Northern California by air, including respondents who have flown into San Francisco International Airport and/or Oakland International Airport. As a result, the majority of respondents who have traveled to Northern California in my sample had flown to one or both of the airports in this matter and more than one quarter of my respondents indicated that they have flown into Oakland International Airport (27.5 percent). Therefore, while I collected data from respondents living in states that Oakland International Airport suggests it is targeting with its name change, I certainly did not limit my sample to consumers unfamiliar with Oakland or San Francisco.¹⁴

14. Dr. Scott both mischaracterizes and misunderstands the sample of consumers in my survey. For example, she claims that my survey sample “excludes entirely 57% of the U.S. population.”¹⁵ But this data point is meaningless as it assumes (without foundation) that individuals in these states have all traveled or will travel by air to Northern California. In fact, less than half of the U.S. population *as a whole* has traveled by air in the last year and of course, not all of those travelers have visited Northern California.¹⁶

15. Dr. Scott also suggests that my survey is unreliable because it excluded areas that she claims *currently* provide the “most passengers”¹⁷ for Oakland International Airport. But areas such as Los Angeles, Las Vegas, and San Diego have had press coverage related to this litigation in a number of news outlets. It would be inappropriate to survey consumers who may have been

¹⁴ Dr. Scott declares that the underserved markets presented in the Port of Oakland’s PowerPoint file “41124 Presentation.pptx” refer to “certain airports with no non-stop flights to Oakland” (*Scott Declaration*, ¶ 11). While this may be the case, I did not sample individuals traveling from specific airports but rather screened for consumers in the state who have or will travel to Northern California. Oakland International Airport has non-stop flights from airports in many of these states included in my survey, including Texas, Illinois, and Louisiana, and non-stop flights servicing New York (Newark airport) and Washington, D.C. (BWI). <https://www.iflyoak.com/fly/airlines-and-destinations/>, last accessed October 21, 2024.

¹⁵ *Scott Declaration*, ¶ 11.

¹⁶ <https://www.airlines.org/dataset/air-travelers-in-america-annual-survey/>, last accessed October 21, 2024.

¹⁷ *Scott Declaration*, ¶ 11. Dr. Scott provides no data to demonstrate what share of passengers come from the areas she has identified.

exposed to information about the lawsuit, as this may bias the results. For example, consumers in Los Angeles,¹⁸ San Diego,¹⁹ and Las Vegas²⁰ could have seen reports detailing the dispute in major newspapers and/or television.

16. Dr. Scott ignores the fact that my sample did include survey respondents from Arizona,²¹ and she presents no data to demonstrate that respondents from states such as South Carolina, Maryland, Connecticut, Kansas, or Virginia (not included in the survey and not specifically listed as targeted states by Oakland International Airport), would have differing impressions compared to respondents from North Carolina, Washington D.C., New York, Texas, Louisiana, Ohio, Michigan, Pennsylvania, Florida, or Illinois (all states identified as having a target market that were included in the survey).

17. Dr. Scott further claims that my sample was “more geographically constrained” because 53 percent of my respondents came from one of three states: New York, Texas, and Florida.²² Of course, the relative populations of these three states compared to states like North Carolina or Louisiana (also states included in the survey) are significantly larger and therefore would reasonably comprise a larger share of the sample. The relative population distributions (i.e., the population in sample compared to the population of the state 18 years and older) are shown in Table 1 below. These data demonstrate that it is reasonable for my sample to be more heavily weighted to the more populous states.

¹⁸<https://kyma.com/news/california-news/2024/04/13/oakland-city-officials-vote-on-airports-name-change/>, last accessed October 17, 2024; <https://www.latimes.com/california/story/2024-04-18/san-francisco-sues-oakland-over-airport-name-change>, last accessed October 18, 2024.

¹⁹ <https://fox5sandiego.com/news/national-news/will-cause-confusion-san-francisco-airport-officials-push-back-against-oakland-airports-proposed-name-change/>, last accessed October 17, 2024.

²⁰ <https://www.8newsnow.com/news/national-news/will-cause-confusion-san-francisco-airport-officials-push-back-against-oakland-airports-proposed-name-change/>, last accessed October 17, 2024.

²¹ *Scott Declaration*, ¶ 11.

²² *Scott Declaration*, ¶ 11.

Table 1. Comparison of Survey Population to State Population²³

State	Butler Survey		2023 Census Estimate	
	Count	Percent	Count	Percent
New York	137	22.6%	19,571,216	13.6%
Texas	104	17.1%	30,503,301	21.3%
Florida	81	13.3%	22,610,726	15.8%
Pennsylvania	53	8.7%	12,961,683	9.0%
Ohio	52	8.6%	11,785,935	8.2%
Illinois	43	7.1%	12,549,689	8.7%
North Carolina	41	6.8%	10,835,491	7.5%
Michigan	37	6.1%	10,037,261	7.0%
Arizona	36	5.9%	7,431,344	5.2%
Louisiana	19	3.1%	4,573,749	3.2%
District of Columbia	4	0.7%	678,972	0.5%
Total Respondents	607	100.0%	143,539,367	100.0%

Source: NERA Airport Survey, May-June 2024; U.S. Census Bureau

18. Dr. Scott focuses on the extent to which my sample included specific states and, without foundation or evidence, suggests that the results would have been different had I included other areas. At a minimum, Dr. Scott could have examined the rates of confusion for different geographic areas in my sample, but she did not.

19. As noted above, my survey included consumers who have flown to Oakland International Airport and San Francisco International Airport (as well as other airports in Northern California). In her focus on state of residence, Dr. Scott further ignores the fact that my sample was comprised of a wide variety of travelers, including²⁴:

- 59.5 percent men, 40.4 percent women;
- 45.8 percent ages 18 – 34, 41.5 percent ages 35 – 54, 12.7 percent 55 or older;

²³ The total 2023 population estimate from the U.S. Census Bureau was 334,914,895. The states included in our sample would have comprised 42.9 percent of the total U.S. population in 2023. See, https://www.statsamerica.org/sip/rank_list.aspx?rank_label=pop1, last accessed October 18, 2024.

²⁴ NERA Airport Survey, May-June 2024, presented in *Butler Declaration*.

- Respondents from the Northeast (31.3 percent), the Midwest (21.8 percent), the South (41.0 percent), and the West (5.9 percent).
- Consumers who travel for pleasure (61.4 percent) and those traveling for business and/or business and pleasure (38.3 percent);
- Individuals who would visit a tourist attraction (75.8 percent), rent a car (66.4 percent, or book a hotel room in San Francisco (59.3 percent);
- Infrequent travelers (every 6 months or less, 49.8 percent) and frequent travelers (3 to 4 times a year or more, 49.4 percent);
- Never traveled by air to Northern California (49.6 percent) and those who have traveled by air to Northern California previously (50.4 percent).

20. Importantly, Dr. Scott ignores the fact that my data demonstrate that confusion rates exceed a net 15 percent for those who have previously traveled to Northern California by air (a net 17.4 percent) and those who are frequent travelers (a net 19.3 percent). These results are shown below in Tables 2 and 3, respectively, and were included in my original report.

Table 2. Overall Confusion - Respondents Who Have Traveled to Northern California

Response	Has Traveled by Air to Northern California				
	Test		Control		Net Percent
	Count	Percent	Count	Percent	
Confused ¹	80	53.3%	56	35.9%	17.4%
Total Respondents	150		156		

S16. Have you traveled by air to Northern California in the past?
Q1. Where do you think the [San Francisco Bay] Oakland International Airport is located?
Q2. Do you think the [San Francisco Bay] Oakland International Airport is...?
Q3. Which of the following, if any, is the primary airport serving the San Francisco Bay Area?

Note: ¹ Respondents are confused if they indicated San Francisco at Q1 OR selected "The same airport as the San Francisco International Airport" at Q2, OR selected "[San Francisco Bay] Oakland International Airport" at Q3.

Source: NERA Airport Survey, May-June 2024

Table 3. Overall Confusion by Frequency of Travel

Response	Travels by Air '3-4 Times a Year' or More Often				
	Test		Control		Net Percent
	Count	Percent	Count	Percent	
Confused ¹	85	56.7%	56	37.3%	19.3%
Total Respondents	150		150		

S14. Approximately how often do you travel by air?

Q1. Where do you think the [San Francisco Bay] Oakland International Airport is located?

Q2. Do you think the [San Francisco Bay] Oakland International Airport is...?

Q3. Which of the following, if any, is the primary airport serving the San Francisco Bay Area?

Note: ¹ Respondents are confused if they indicated San Francisco at Q1 OR selected "The same airport as the San Francisco International Airport" at Q2, OR selected "[San Francisco Bay] Oakland International Airport" at Q3.

Source: NERA Airport Survey, May-June 2024

21. Dr. Scott attempts to mischaracterize my survey population as under-representative by simply focusing on respondents' state of residence. She ignores the data which plainly demonstrate my survey encompassed a broad range of relevant consumers, including more than 50 percent of respondents who have traveled to Northern California by air before and 42.8 percent who have specifically flown into San Francisco International Airport, Oakland International Airport, or both of these airports.

B. The Survey Tests Oakland International Airport's Use of "San Francisco Bay Oakland International Airport" in a Real World Setting

22. Dr. Scott claims my study lacks external validity because it (1) does not replicate how the Southwest or Google Flights pages appear currently; (2) does not allow respondents to look at additional webpages she believes to be relevant; and, (3) is only a test of confusion at one point in time. Dr. Scott's argument is without merit and does not align with the typical standards for establishing a likelihood of confusion. Furthermore, Dr. Scott could have tested some

alternative stimulus (at a different point in time) to evaluate whether there was difference in the rate of confusion, but she did not.

23. As Dr. Scott herself notes, my survey was conducted within the first “30 days in which the new name was being rolled out to potential consumers.”²⁵ While Dr. Scott suggests this fact undermines the reliability of my data (and it does not),²⁶ the timing of the survey and the posture of the litigation likely does play a role in how and the extent to which Oakland International Airport’s new name appears on particular websites.

24. As indicated in my initial report, I was hired prior to Oakland International Airport’s name change and the survey data were collected between May 9th and June 8th, 2024.²⁷ At the time of the survey, it was unknown the exact manner in which Oakland International Airport’s name would appear in any search or platform.²⁸ Of course, in general, surveys test consumer perception at a point in time, and while Dr. Scott has alleged the timing of my survey necessarily yields a higher rate of confusion which will decrease over time, she presents no data or evidence to support this conjecture.²⁹ In fact, the contrary could easily occur.³⁰ Dr. Scott could

²⁵ *Scott Declaration*, ¶ 21.

²⁶ Dr. Scott cites to no authority or literature to support the claim that a likelihood of confusion can only be conducted when some specific or substantial period has passed after infringement.

²⁷ *Butler Declaration*, Exhibit A, ¶ 20.

²⁸ I understand that online search results are largely determined by parties other than the San Francisco and Oakland International Airports and likely depend on a variety of individualized factors (including what a consumer has searched for in the past, consumer profile data associated with them or their specific ISP address, etc.). Therefore, it is impossible, without additional evidence, to determine what a typical search would yield or how, given a particular set of searches, Oakland International Airport’s new name would appear. While Dr. Scott has conducted eight searches, there is no evidence that her results would be typical or even representative.

²⁹ For example, Dr. Scott does not present a single respondent in the Control Group who indicated that they are not confused because they “had knowledge and prior experience with the prior airport name.” (*Scott Declaration*, ¶ 21). Furthermore, it is entirely unclear why Dr. Scott believes such a response would somehow artificially “depress” confusion as any respondent who is aware of the difference and knows the Oakland International Airport would not, presumably, be confused in the Test Group.

³⁰ As noted by the Port of Oakland, the use of the name over time will have an impact. “Incorporating “San Francisco Bay” in a name that also maintains the name “Oakland” will, **over time**, increase the visibility of OAK flights when “San Francisco Bay Area” or similar terms are used in consumer online searches, aiding in the overall retention of flights and destinations.” Agenda Report.pdf, *emphasis added*.

have conducted a survey months after I collected data to evaluate whether in fact, confusion has changed, but she did not.

25. Perhaps more importantly, Dr. Scott's focus on a limited set of search terms and a small set of specific search results is misguided. The survey I designed was not intended to evaluate whether the specific Southwest or Google Flights webpages cause consumers to be confused. Instead, and as was appropriate, the survey was designed to present consumers with a realistic stimulus in which the name San Francisco Bay Oakland International Airport could occur.

26. Dr. Scott seems to suggest that my survey is invalid because Southwest and other airlines serving Oakland International Airport do not currently,³¹ and would not use the name San Francisco Bay Oakland International Airport on their websites.³² As a simple matter, it would obviously be inappropriate to evaluate the extent to which the infringing name causes confusion by testing something *without* the new name. And while Dr. Scott may have been able to identify webpages where the name does not currently appear, her suggestion that carriers and their webpages will not display San Francisco Bay Oakland International Airport stands in contrast to Oakland International Airport's desire to use the name to increase awareness amongst potential customers. Furthermore, Dr. Scott presents no data or evidence to demonstrate that the pages she identifies in her Exhibit 5 are the primary or typical way in which consumers would book flights to the San Francisco Bay Area.

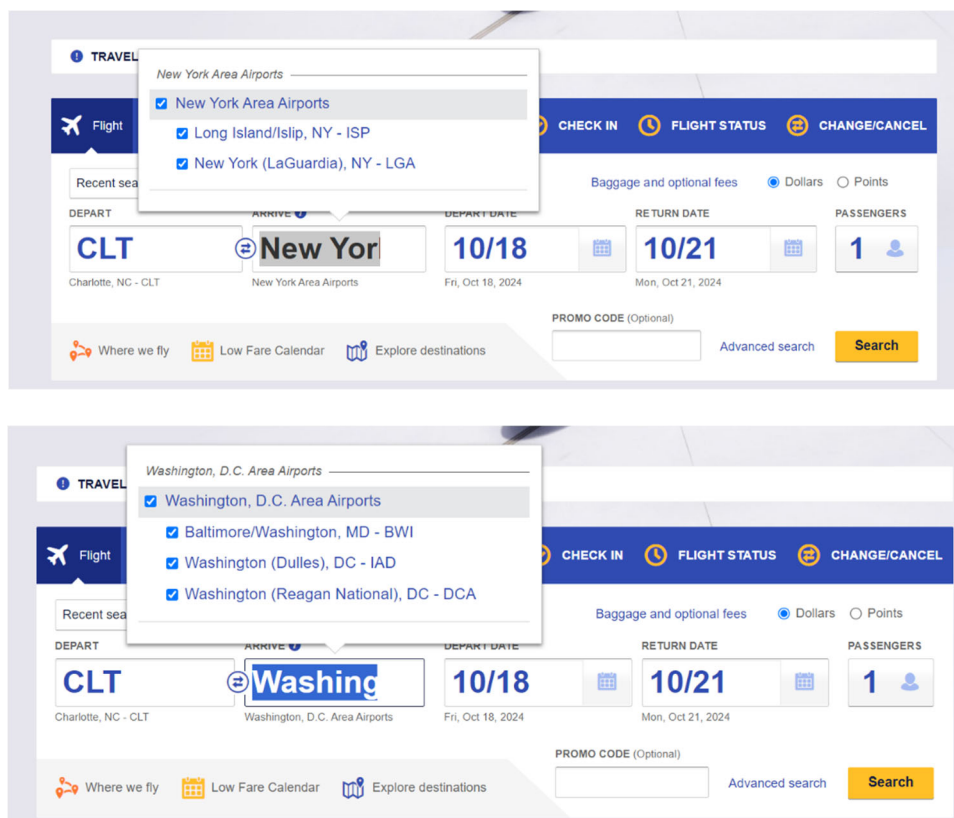
27. Moreover, contrary to Dr. Scott claims, Southwest does use the official airport name (not just the city and airport code) to identify a specific airport when a geographic area has more than one. For example, as shown in Figure 1 below, Southwest uses the airport name to

³¹ It is entirely possible that the new Oakland International Airport name does not appear given carrier's and other third-party platform's awareness of the current litigation.

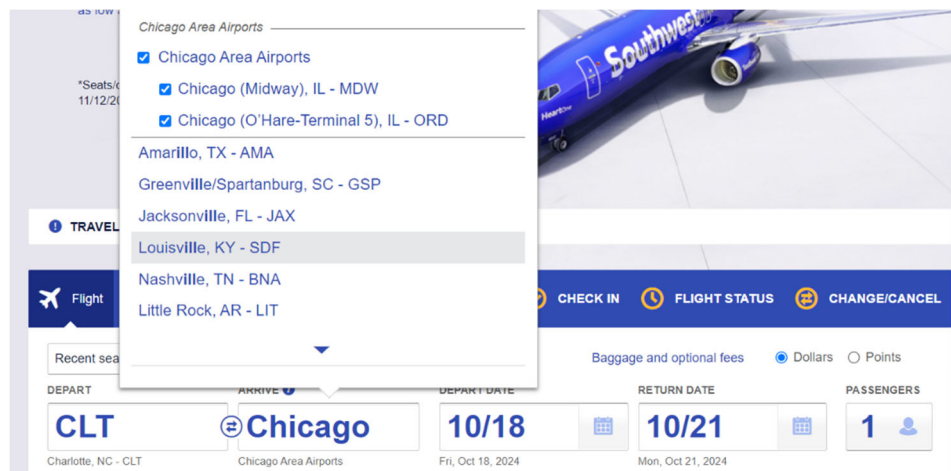
³² *Scott Declaration*, ¶ 14.

distinguish *LaGuardia* Airport from the Long Island airport in New York. It also specifically identifies both *Dulles* and *Reagan National* when searching for flights to Washington, DC, and *Midway* and *O'Hare* Airports for flights to Chicago. See Figure 1 below.

Figure 1. Examples of Southwest Airline's Use of Airport Names³³



³³ <https://www.southwest.com/>, last accessed October 21, 2024.



28. Therefore, while Dr. Scott may be able to demonstrate that in the first 30 days, with pending litigation, Southwest has not used Oakland International Airport's new name, there is no indication that this will be the case going forward. Further, even assuming Southwest elected to only display the city and call letters, the Test (and Control stimulus) I created for the survey is appropriate for a number of reasons.

29. Again, as explained above I was not testing whether Southwest, or Google Flights, or any other specific platform, is the cause of consumer confusion. In fact, all aspects of the platform are held constant between the Test and Control groups and the only thing being tested is Oakland International Airport's use of the name San Francisco Bay Oakland International Airport. When I designed and implemented my survey, the name change had only recently been made. Absent the ability to review all of the ways in which the name may be used in the future (for example in promotional materials, in advertisements for flight deals, on travel websites, etc.), I needed to provide consumers with a realistic example of how the new name might appear. Dr. Scott cites to no data or source indicating that a likelihood of confusion survey must test examples of the product or service when it does not use the mark, and she cites no data to demonstrate that

Oakland International Airport's new name will *only* ever appear with the full city name and call letters.

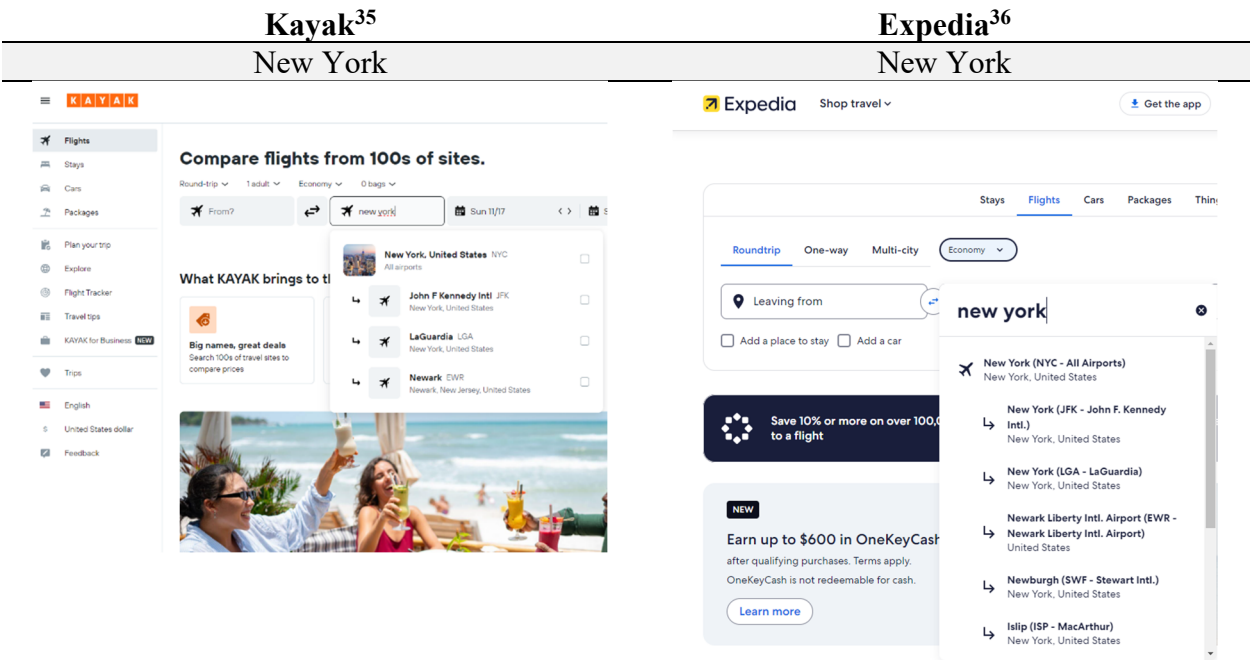
30. Contrary to Dr. Scott's claim that my survey does not fairly represent the "current real world," my survey stimuli was carefully designed to display Oakland International Airport's use of the name in a real-world environment which included the at-issue name, the city, and the airport call letters. Specifically, my survey was designed to replicate real world consumer experiences in the following ways:

- a. Only consumers who fly Southwest were shown Southwest's page. If a respondent indicated they would use some other airline, they were shown the Google Flights page;
- b. Southwest lists three airports for a search for "san fran" including San Francisco, Oakland, and San Jose. All three of these airports were shown to respondents in both the Test Group and the Control Group;
- c. On the second page shown to respondents in the Southwest search, each airport is listed first with the call letters in large font, followed by the city name, and the airport name is listed last;³⁴
- d. Currently, Southwest lists the airport name for the departing flight so it would not be improbable that the airport name would also be listed for the arrival airport.
- e. As was shown in my survey, the Google Flights page lists the city name and then, if multiple airports, the names of the airports (Google Flights does not list the call letters).

³⁴ Dr. Scott incorrectly asserts that on the Southwest website "all airports only indicated by city names and airport codes." (*Scott Declaration*, ¶ 15). In fact, when there are multiple airports serving one metro area, Southwest always includes the airport name for the departing flight (see NY, DC, Chicago, Tampa, and Miami).

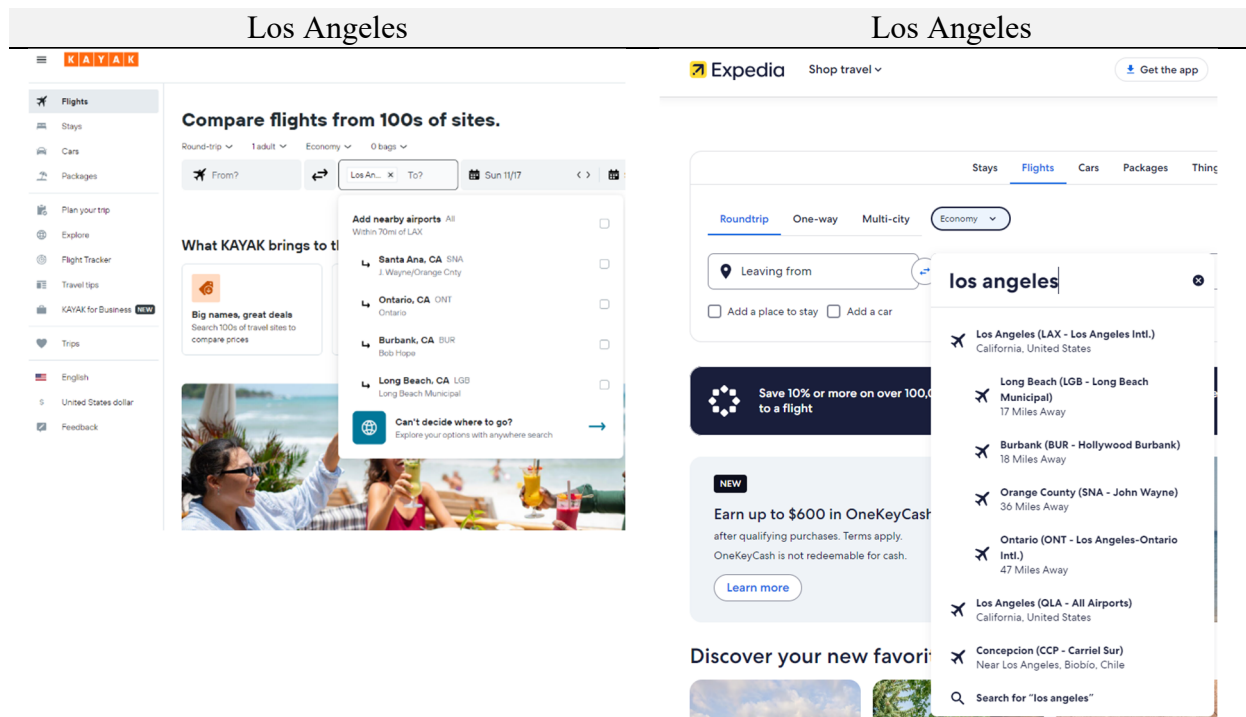
31. In addition to the pages I tested, there are a number of other popular search engines that include the full airport name. For example, as shown below in Figure 2, Kayak and Expedia both list the airport name and city.

Figure 2. Examples of Websites that Use the Airport Name When Booking Flights



³⁵ <https://www.kayak.com/>, last accessed October 21, 2024.

³⁶ <https://www.expedia.com/>, last accessed October 21, 2024.



32. Dr. Scott’s assessment of additional webpages dispelling confusion is pure conjecture and is premised on the fact that currently Oakland International Airport’s use of the new name does not appear on the additional pages she has captured.³⁷

33. Dr. Scott argues that had consumers been able to study the pages or had they been provided with additional information “it would be obvious that the airports are different.”³⁸ But the survey tests whether consumers believe, based on the name, the San Francisco Bay Oakland International Airport is, or is related to, the San Francisco International Airport. Survey respondents are presented with additional information, including the name of the other airports, the call letters, the city, and the distance to San Francisco (in Google Flights). Dr. Scott assumes

³⁷ For examples of actual confusion, see Plaintiff City and County of San Francisco’s Notice of Motion and Motion for Preliminary Injunction Enjoining Defendants; Memorandum of Points and Authorities in Support Thereof, *City and County of San Francisco v. City of Oakland and Port of Oakland*, United States District Court for the Northern District of California, Case No. 3:24-cv-02311-TSH, dated September 17, 2024, pp. 9 – 11.

³⁸ *Scott Declaration*, ¶ 20.

that consumers would necessarily view the two names as representing different locations because there are multiple flights and different call letters but has not tested this theory and presents no consumer evidence to support her claim. Indeed, Dr. Scott presents no evidence that consumers generally refer to airports or make travel plans or reservations by searching airport call letters.³⁹

34. Finally, Dr. Scott seems to suggest that identifying any rate of confusion would be difficult because consumers are “likely to be exposed to many types and sources of information.”⁴⁰ Of course, consumers seeking to purchase many products or services may be exposed to all sorts of information prior to the survey. The fact that consumers have pre-existing beliefs is, in part, the purpose of the Control Group which can hold constant the extent to these beliefs (as opposed to the new name) are driving confusion. In this case, any respondent who believed that the Oakland International Airport was in San Francisco or is the same airport as San Francisco International Airport prior to the survey or based on some other set of information could indicate this in the Control. Furthermore, my survey tested two different forms of contextual information (Google Flights and Southwest) and included consumers who were more sophisticated in terms of travel frequency and flights to Northern California. In each circumstance (i.e., different stimuli or more “informed” populations), the net rates of confusion exceed 15 percent.

C. The Survey Stimuli Are Realistic, Reflect the Marketplace, and Are Correctly Designed to Isolate the Impact of Oakland International Airport’s Use of “San Francisco Bay Oakland International Airport”

35. Dr. Scott again mischaracterizes the survey design as one which is testing Southwest’s or Google’s platform rather than Oakland International Airport’s use of the name San

³⁹ Oakland International Airport has indicated that its new name will ensure its airport appears when consumers search for “San Francisco Bay,” not “OAK” or “SFO.”

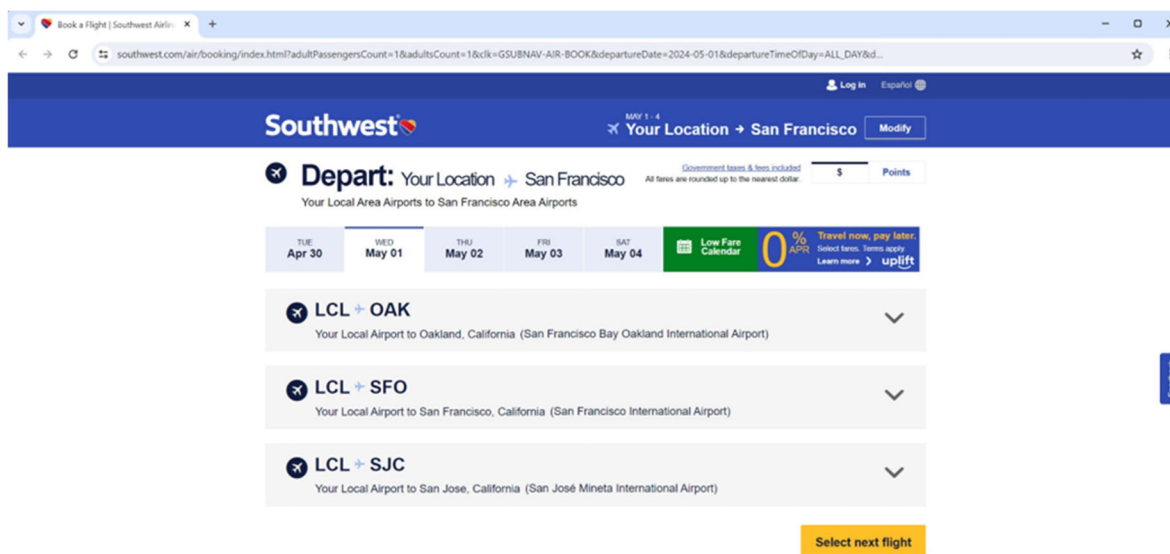
⁴⁰ *Scott Declaration*, ¶ 22.

Francisco Bay Oakland International Airport. As stated in my original report, and as readily depicted in the questionnaire, the name for Oakland International Airport (and not any other airport's name) is what the survey is intended to test.

36. Dr. Scott argues that because the Test stimulus for the first page of the Southwest website included the at-issue name and the other airports listed did not, my survey violates the scientific principle of holding everything constant between the Test and Control groups. But this is precisely what the survey does – in the Test stimuli, the at-issue name is shown (along with the airport call letters) and in the Control stimuli it is not. It appears that Dr. Scott is suggesting that the Test and the Control should have included names for the other airports listed. Even if this were correct (which it is not), the inclusion of these additional names would be held constant between the Test and the Control and therefore any impact would be nullified.⁴¹ Further, Dr. Scott's criticism ignores the fact that respondents are shown a second Southwest page in which the listing for each airport is identical in format. As shown below in Figure 3 (second Southwest page, Test Group), each flight listed includes the call letters, the city, and the airport name.

⁴¹ Dr. Scott also suggests that the "highlighting" present on the Southwest page is problematic, but this is how Southwest uses highlighting on its actual site. Further, Dr. Scott hypothesizes that confusion in the control may be "too low" and the word "International" may cause consumers to associate OAK with SFO (*Scott Declaration*, FN 34). Again, Dr. Scott provides no data to support this conjecture. I understand that generally any airport with international flights includes "International" in its name, so it is unclear why consumers who travel by air would be confused by this word alone. Moreover, respondents in the Test and the Control were asked about the "San Francisco Bay Oakland International Airport" or "Oakland International Airport" respectively and therefore any potential confusion created solely by the appearance of the word "International" would be measured in the Control (and netted out of the final confusion estimates).

Figure 3. Southwest Webpage Shown to Survey Respondents in Test Group



37. Of course, the difference between the first page of the Test and Control in the Southwest stimuli cannot be the element that explains confusion (as Dr. Scott seems to suggest), as the results from the Google Flights page also show confusion. In the Google Flights page, both airports in the Test and the Control include the full airport names (as well as the mileage to the city) and result in a net rate of confusion of 24.3 percent.

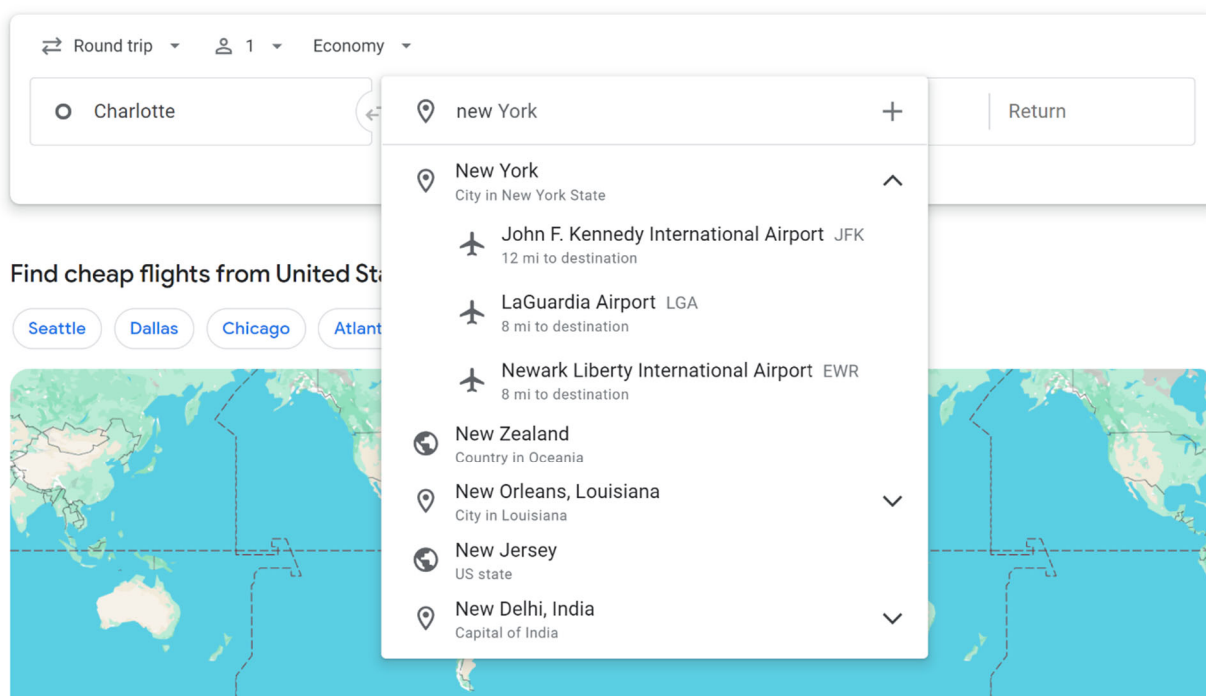
38. Dr. Scott also takes issue with the format of the Google Flights webpage and indicates “For the Google Flights platform, the Butler Survey does not use the actual Google Flights webpages as they currently appear when one enters “San Fran” as the search term.”⁴² And while Dr. Scott claims she can generate a different set of results for Google Flights, the survey I designed provides a reasonable approximation of how multiple airports located in a similar geographic area appear on this platform.

39. In designing my survey, I observed that often Google Flights lists airports located in close geographic proximity indented under a subheading, with information about the travel

⁴² *Scott Declaration*, ¶ 16.

distance to the intended destination. For example, as shown below in Figure 4, when searching for a flight to New York, Google lists three airports under a subheading for “New York” (John F. Kennedy International Airport, LaGuardia Airport, and Newark Liberty International Airport). Notably, Newark Liberty International Airport, which is located in the state of New Jersey, is listed under the “New York” heading.

Figure 4. Google Flight Search Result for “New York”⁴³

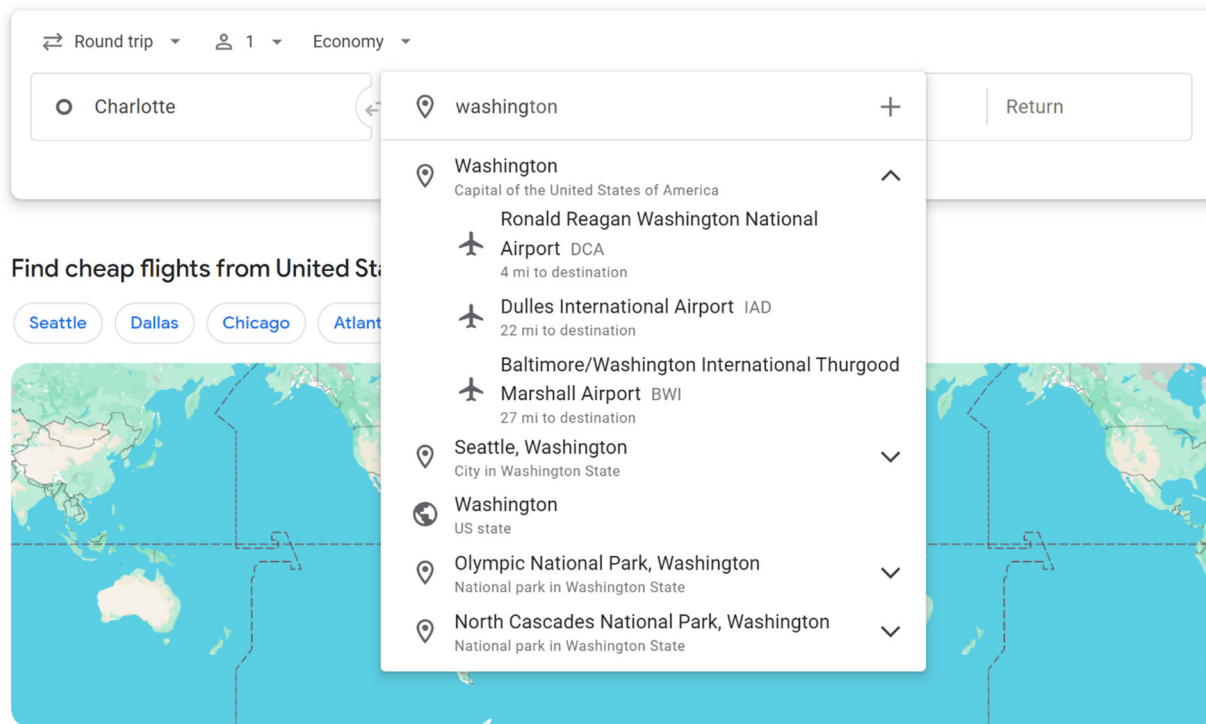


40. There are a number of similar examples on Google Flights, including a search for “Washington” (shown below in Figure 5) which provides options for Ronald Reagan Washington National Airport and Dulles International Airport (both located in Virginia), and Baltimore/Washington International Thurgood Marshall Airport (located in Maryland).⁴⁴

⁴³ <https://www.google.com/travel/flights>, last accessed October 21, 2024.

⁴⁴ Additional examples can be found in **Exhibit C**.

Figure 5. Google Flight Search Results for “Washington”



41. In her report, Dr. Scott provides an example in which the Oakland airport (using the new name) appears after a Google search for “San Francisco.”⁴⁵ Notably, conducting this same search now no longer shows the Oakland airport in any format, so it is unclear why Dr. Scott’s search yielded the particular results it did, or how her results are typical if they no longer appear. In fact, the variability in how these search results appear demonstrates again why the correct test in this matter is not an evaluation of a particular platform or set of search results, but is a test which presents Oakland International Airport’s use of the name “San Francisco Bay Oakland International Airport” in a realistic manner.

⁴⁵ Dr. Scott’s example demonstrates that Google Flights would use the full airport name (“San Francisco Bay Oakland International Airport”), not just the city and airport code the airport, and that the Oakland airport listing would occur *side by side* with the San Francisco airport listing. This is consistent with what was tested in my survey.

42. Dr. Scott seems to argue that not indenting the Oakland airport result and referencing “Alameda County” would dispel any potential confusion for respondents shown the Google Flights results page. First, Dr. Scott has not presented any examples from my data in which respondents indicate that the airport shown is located in the *county* of San Francisco. Further, Dr. Scott assumes that some set of consumers would know the county of each airport and including this information would provide necessary clarity.⁴⁶ Dr. Scott has no data to support this assertion and provides no indication as to why a county name would help travelers (particularly those who may be unfamiliar with the specific counties of the Bay Area) distinguish between Oakland International Airport and San Francisco International Airport or why this information would help consumers identify the actual San Francisco Airport.

D. The Survey Questions Appropriately Measure Potential Confusion Associated with Oakland International Airport’s Use of “San Francisco Bay Oakland International Airport”

43. Dr. Scott asserts that Question 3 in my survey, “Which of the following, if any, is the primary airport serving the San Francisco Bay Area?” is unreliable because it is “not directly related to the question of whether consumers would believe that they would be flying into the City of San Francisco or into SFO when they would actually be flying into Oakland if they chose the San Francisco Bay Oakland International Airport.”⁴⁷ Of course, where the airport is located and whether consumers believe San Francisco Bay Oakland International Airport is the San Francisco Airport are addressed by Questions 1 and 2 of my survey. As noted in my original report, if I calculate confusion solely on these two questions, the net rate of confusion is 18.5 percent.⁴⁸

⁴⁶ *Scott Declaration*, ¶ 34.

⁴⁷ *Scott Declaration*, ¶ 36.

⁴⁸ *Butler Declaration*, FN 49.

44. Again, Dr. Scott offers completely unsupported conjectures as to how consumers may alternatively interpret “primary,” including believing this term references the “most centrally located airport in the San Francisco Bay Area or the airport serving the largest portion of the entire San Francisco.”⁴⁹ Dr. Scott entirely misses the point with this criticism. Any respondent selecting the airport listed as “primary” because they believe Oakland International Airport is centrally located or serves more local residents would indicate this response in the Control Group and would therefore be netted out of the confusion estimate. In other words, the question performs exactly as intended and measures the extent to which the name “San Francisco Bay Oakland International Airport” causes consumers to believe that this is the main or primary airport in Northern California. Responses based on pre-existing understandings or conceptions about which airport (San Francisco International Airport or Oakland International Airport) is primary are measured by the Control and are subtracted from the overall confusion estimate.

45. Dr. Scott also suggests Question 3 is problematic because it is only asked of respondents who did not indicate that the San Francisco International Airport and San Francisco Bay Oakland International Airport are the same. While Dr. Scott suggests that I have speculated about consumer perceptions, this is not the case. In fact, my data demonstrate there are respondents who answer “unsure” in Q2 (whether San Francisco International Airport and San Francisco Bay Oakland International Airport are the same) who later indicate at Q3 that they believe San Francisco Bay Oakland International Airport is the primary airport.⁵⁰

46. Finally, Dr. Scott asserts that she can recalculate confusion based solely on the responses to Q1 and demonstrate that there is no confusion, but this is a wholly unreliable

⁴⁹ *Scott Declaration*, ¶ 36.

⁵⁰ See for example, Respondents 2239, 4122, 8945, 9906, 11488, 11788, 15565, 15759, and 21036.

analysis.⁵¹ First, Dr. Scott incorrectly limits her recoding exercise to only the responses to the Google Flights stimulus, despite having no evidence that this presentation is the sole manner in which San Francisco Bay Oakland International Airport would appear. Moreover, simply relying on open-ended responses is problematic as the verbatim answers provided by respondents in Q1 are often not specific enough to determine precisely where they believe the airport is located.⁵² For example, some respondents offer answers like “California” or “San Francisco Bay.” One cannot determine that such respondents are not confused based on broad or vague answers.

47. As noted in my original report, I conservatively coded the open-ended responses such that “only respondents who specifically stated that the airport was located in “San Francisco” were counted. Respondents who indicated the airport was located **near** San Francisco, or near the San Francisco Bay Area were categorized as ‘Other.’”⁵³ While this yields a net rate of confusion of 9.4 percent, it underrepresents that actual rate of confusion because respondents who offered imprecise or broader descriptions were not counted. As shown in Table 4 below, there are many respondents who could have been confused at Q1 but were not counted as such because I had additional questions which allowed me to more precisely interpret their understandings. All of the respondents in Table 4 below were not counted as confused in my analysis of Q1 (and presumably

⁵¹ Dr. Scott indicated that the coding scheme for Q1 was not produced. These data were not requested by counsel or Dr. Scott, and I have provided them as **Exhibit D**.

⁵² “Open-ended and closed-ended questions may elicit very different responses. Most responses are less likely to be volunteered by respondents who are asked an open-ended question...” Diamond, S. S. (2011). “Reference Guide on Survey Research,” Reference Manual on Scientific Evidence, Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence; Federal Judicial Center; National Research Council, pp. 359-423 at p. 392. See also, Bernstein, D.H. and Keller, B. P. (2022). “Survey Evidence in False Advertising Cases,” *Trademark and Deceptive Advertising Surveys: Law, Science, and Design, Second Edition*, edited by Diamond, S. S., and Swann, J. B., pp. 187-235 at p. 222; “Open-ended questions are appropriate to gauge consumers’ initial reaction... but they may be insufficient to evaluate reactions to more specific or secondary messages, even if consumers generally perceive those messages.”

⁵³ *Butler Declaration*, FN 48.

would not have been counted by Dr. Scott) but indicated that they believed San Francisco Bay Oakland International Airport is the same airport as SFO in the subsequent question.

Table 4. Examples of Test Group Respondents Not Coded as “Confused” at Q1, But Who Indicated Confusion at Q2

Respondent ID	Stimulus Shown	Response at Q1
107	Southwest	It is in San Francisco Oakland area
2743	Google Flights	in San Francisco, maybe just outside the city in between SF and Oakland
2847	Google Flights	Its located at the east of San Francisco.
7883	Google Flights	Just south of San Francisco off route 101
9845	Google Flights	Near to the downtown
10775	Google Flights	Just outside of SF city
11446	Google Flights	south of san francisco
11508	Southwest	near san francisco bay area
11691	Southwest	San Francisco area airport
11750	Google Flights	North of the town
19546	Southwest	san Mateo county, california

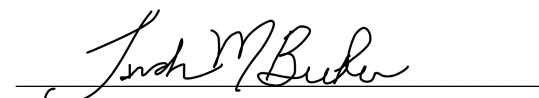
48. Dr. Scott’s “recoding” exercise is improperly limited to one stimulus (Google Flights) and relies wholly on coding that omits respondents who provide evidence of confusion in later questions. Unlike the analysis I conducted, Dr. Scott simply assumes that any respondent who indicated anything other than “San Francisco” (including those who said things like “San Francisco Bay” or “Northern California” or even “I’m not quite sure”) would not be counted as confused. This is not an informative or reliable analysis.

V. CONCLUSIONS

49. In total, Dr. Scott has offered a series of criticisms that mischaracterize and misrepresent the sample and survey I designed. Further, she offers a series of hypothetical conjectures about how some other set of consumers might respond to some other set of stimuli with some other set of questions. But Dr. Scott has not designed a survey or tested any of her

claims and provides no data, survey or otherwise, to support her assertions. Dr. Scott's criticisms about the relevant population of interest contradict numerous statements made by Oakland International Airport. Moreover, Dr. Scott ignores survey data that contradict her assumptions, including data demonstrating that: (1) consumers who travel frequently by air and those who have traveled by air to Northern California previously are also confused by the name; (2) consumers are confused regardless of whether the call letters are present or the airport's distance from San Francisco is provided; (3) and consumers are confused when asked where the airport is located and whether the San Francisco Bay Oakland International Airport is the San Francisco International Airport. My survey of 607 relevant consumers who have or are likely to fly to Northern California in the next year demonstrates that there is a substantial likelihood of confusion created by the name "San Francisco Bay Oakland International Airport," and consumers are likely to believe this airport is located in San Francisco, is the San Francisco International Airport, or is the primary airport serving San Francisco.

50. My opinions and conclusions as expressed in this report are to a reasonable degree of professional and scientific certainty. My conclusions have been reached through the proper application of survey methods, and using standard methodologies relied upon by experts in the field of survey and market and consumer research. My opinions will continue to be informed by any additional material that becomes available to me. I reserve the right to update and or supplement my opinions if provided with additional information. I declare under penalty of perjury that the foregoing is true and correct.



Sarah Butler, Senior Managing Director

October 22, 2024

Exhibit A

NERA

Economic Consulting

Sarah Butler

Senior Managing Director

National Economic Research Associates, Inc
4 Embarcadero, Suite 400
San Francisco, CA 94111
+ 1 415 291 1000 Fax + 1 415 291 1010
Direct dial: + 1 415 291 1022
sarah.butler@nera.com
www.nera.com

SARAH BUTLER, M.A. SENIOR MANAGING DIRECTOR

Ms. Butler is an expert in survey research, market research, sampling, and statistical analysis. She has applied her expertise in a wide range of litigation and strategic business cases. Her litigation and project experience includes survey research, market research, the design of samples, and the statistical and demographic analysis of large data files in a number of areas including:

Intellectual Property

- Trademark and Trade Dress Infringement: Design, analysis, and critique of surveys used to measure consumer confusion, secondary meaning, and dilution in trademark and trade design infringement cases.
- False and Misleading Advertising: Design, analysis and critique of surveys used to measure consumer perceptions and the materiality of advertising claims.
- Patent Infringement: Sample designs and surveys to the value of patented feature of a larger product and to establish rates at which infringing material exist in populations of products.
- Copyright infringement: Sampling plans and analysis of the rates of infringing material in populations of shared information (such as through websites or other sharing medium).

Mass Torts/Class Actions

- Conduct surveys and design samples providing evidence on issues of commonality and consumers' awareness of key documents or facts and reliance on representations.
- Analyze large databases of claims files to generate invoices, estimate future liabilities and calculate policy shares for insurer liabilities in asbestos, tobacco and pharmaceuticals.
- Design, analyze and critique surveys and sampling plans used to evaluate employment and promotion records. Review and design surveys for purposes of estimating key facts in labor

Sarah Butler

class actions including time to complete activities, exempt/nonexempt activities, and meal and rest break issues.

Antitrust

- Design, analysis and critique of surveys and other market research used as evidence of consumer purchasing and switching behavior in the areas of CPG, entertainment, automobiles, public transportation, sports and consumer electronics.
- Design, analysis and critique of surveys used to demonstrate consumer price sensitivities and willingness to pay.

Prior to joining NERA, Ms. Butler worked in market research, conducting survey research, focus groups and in-depth interviews.

Education

Temple University

Applied Sociology, coursework, exams and dissertation proposal complete (2005).

Temple University

M.A. Sociology, (2000).

Trinity College, Dublin Ireland

M.Phil. (1997).

Wellesley College

B.A. Sociology and History (with honors). (1995).

Professional Experience

July 2006 - Present

Senior Consultant – Senior Managing Director

NERA Economic Consulting
San Francisco, California, USA

Oct 2005 – May 2006

Special Consultant

NERA Economic Consulting
London, England

Jan 2003 – Oct 2005

Senior Analyst - Consultant

NERA Economic Consulting
Philadelphia, Pennsylvania, USA

2002 - 2003	Consultant Integrated Marketing Associates Bryn Mawr, PA, USA
Oct 1998 - Jan 2002	Research Associate – Analyst NERA Economic Consulting Philadelphia, Pennsylvania, USA
Sept 1998 – May 2003	Adjunct Professor Temple University Philadelphia, Pennsylvania, USA
Jan 1997 – Feb 1998	Manager of Member Research Society for Neuroscience Washington DC, USA

Expert Analysis and Testimony

2024

Intellectual Property Matters

City and County of San Francisco* v. City of Oakland, and Port of Oakland. United States District Court Northern District of California. *Expert Report.*

Fluidmaster, Inc., v Danco, Inc.* United States District Court Northern District of Texas Dallas Division. *Rebuttal Report.*

In the Matter of H&R Block, Inc., HRB Digital LLC, HRB Tax Groups, Inc. United States Federal Trade Commission, Washington DC. *Expert Report. Rebuttal Report. Deposition.*

Punchbowl, Inc. v. AJ Press LLC.* United States District Court Central District of California. *Expert Report.*

SharkNinja Operating LLC and SharkNinja Sales Company v. Dyson Inc. and Dyson Technology Limited.* United States District Court District of Massachusetts. *Expert Report. Deposition.*

Applied Innovation, Inc. v. Lowery Corporation DBA Applied Innovation.* United States Patent and Trademark Office before the Trademark Trial and Appeal Board. *Expert Report.*

Puma SE v. Zhang Kang.* United States Patent and Trademark Office before the Trademark Trial and Appeal Board. *Expert Report.*

Headwater Research LLC v. Samsung Electronics Co. Ltd. and Samsung Electronics America, Inc.* United States District Court Eastern District of Texas Marshall Division. *Rebuttal Report. Deposition.*

CoStar Group, Inc. and Costar Realty Information, Inc.* v. Commercial Real Estate Exchange, Inc. United States District Court Central District of California. *Rebuttal Report. Deposition.*

Motiv Power Systems, Inc. v. Motive Technologies Inc.* United States Patent and Trademark Office before the Trademark Trial and Appeal Board. *Expert Report. Reply Report.*

WEX Inc.* v. HP Inc. and Hewlett-Packard Development Company, L.P. United States District Court District of Maine. *Declaration. Rebuttal Declaration.*

Proximo Spirits, Inc.* v. Green Lake Brewing Co., LLC d/b/a Fremont Brewing Co.; and Does 1-10, inclusive. United States District Court Central District of California, Western Division. *Expert Report.*

Gesture Technology Partners, LLC v. Motorola Mobility LLC.* United States District Court Northern District of Illinois, Eastern Division. *Rebuttal Report.*

General Access Solutions, Ltd. v. Verizon Communications, Inc. et al.* United States District Court Eastern District of Texas, Marshall Division. *Expert Report. Deposition.*

Benefit Cosmetics, LLC v. e.l.f. Cosmetics, Inc.* United States District Court Northern District of California, San Francisco Division. *Expert Report. Reply Report. Deposition. Trial Testimony.*

Corephotonics, LTD v. Apple Inc.* United States District Court Northern District of California. *Rebuttal Report. Deposition.*

Nutramax Laboratories, Inc. and Nutramax Laboratories Veterinary Sciences, Inc. v. Zesty Paws LLC and Health and Happiness (H&H) US International Incorporated.* United States District Court Middle District of Florida, Orlando Division. *Expert Report. Deposition. P.I. Testimony.*

Blue Yonder Group, Inc.* v. Kinaxis Inc. and Kinaxis Corp. United States District Court Northern District of Texas, Dallas Division. *Expert Report.*

Puma SE, and Puma North America Inc. v. Brooks Sports, Inc.* United States District Court Southern District of Indiana, Indianapolis Division. *Expert Report. Deposition.*

Class Action Matters

Veronica Shirley, individually and on behalf of all others similarly situated v. Reynolds Consumer Products LLC.* United States District Court Northern District of California. *Expert Report. Rebuttal Report.*

Tanysha Newman, individually and on behalf of all others similarly situated v. Bayer Corporation and Bayer Healthcare LLC.* United States District Court for the Southern District of New York. *Expert Report. Rebuttal Report. Deposition.*

Clark Alexandre, individually and on behalf of all others similarly situated v. Alcon Laboratories, Inc.* United States District Court for the Southern District of New York, White Plains Courthouse. *Expert Report.*

Jeffrey Albert Sjobring, on behalf of himself and all others similarly situated* v. First American Title Insurance Company, First American Title Company, and Does 1 – 500. Superior Court of the State of California in and for the County of Los Angeles. *Declaration. Deposition.*

Claudia Newton and Brandy Leandro v. R.C. Bigelow, Inc., and Does 1 through 10.* United States District Court Eastern District of New York. *Rebuttal Report.*

Miguel Frias, Jessica Avilez, and Roy Campbell, individually and behalf of all others similarly situated v. Mars Wrigley Confectionary US LLC.* United States District Court Southern District of New York. *Rebuttal Report.*

In RE: Marriott International Inc., Customer Data Security Breach Litigation. City of Chicago* v. Marriott International, Inc. and Starwood Hotels & Resorts Worldwide, LLC. United States District Court for the District of Maryland, Southern Division. *Expert Report. Rebuttal Report. Deposition.*

Edward Pistorio et al. v. FCA US LLC.* United States District Court Eastern District of Michigan. *Expert Report. Deposition.*

Cat Brooks and Rasheed Shabazz, individually and on behalf of all others similarly situated* v. Thompson Reuters Corporation. United States District Court for the Northern District of California, San Francisco Division. *Expert Report.*

Nicholas Usler, et al., v. Vital Farms, Inc., et al.* United States District Court for the Western District of Texas. *Expert Report.*

William Lessin and Carol Smalley et al., on behalf of themselves and all others similarly situated v. Ford Motor Company, a Delaware corporation; and Does 1 through 10 inclusive.* United States District Court, Southern District of California. *Expert Report. Deposition.*

Other Matters

Megan White, Jeronimo Aguilar, Loren Wayne Kidd, Lyric Nash, Nicollette Jones, and Odette Zapata* v. Sacramento Police Department; The City of Sacramento; Daniel Hahn, and Does 1 – 200 (the names and numbers of which are currently unknown). United States District Court, Eastern District of California, Sacramento Division. *Expert Report.*

2023

Intellectual Property Matters

SpaceTime3D, Inc. v. Apple Inc.* United States District Court Western District of Texas, Austin Division. *Expert Report. Deposition.*

PWNHealth, LLC d/b/a Everly Health Solutions v. Walgreen Co.* American Arbitration Association Case No. 01-22-0002-4919. *Rebuttal Report. Arbitration Testimony.*

Evolve Biosystems, Inc.; and the Regents of the University of California, a corporation* v. Abbott Laboratories. United States District Court for the Northern District of Illinois, Eastern Division. *Expert Report. Deposition.*

Lincare Holdings Inc. and Lincare Licensing Inc.* v. Doxo, Inc. United States District Court for the Middle District of Florida Tampa Division. *Expert Report. Deposition. Reply Report.*

Revelry Vintners, LLC, v. Mackay Restaurant Management Group, Inc., Fire & Vine Holdings, LLC, and Yellowhawk Resort WW, LLC.* United States District Court Eastern District of Washington at Spokane. *Rebuttal Report.*

Macy's IP Holdings, LLC,* v. Aroma360, LLC. United States District Court Southern District of New York. *Expert Report. Reply Report.*

Vans, Inc. and VF Outdoor, LLC, v. Walmart, Inc., The Doll Maker, LLC, and Trendy Trading, LLC.* United States District Court Central District Of California. *Rebuttal Report. Deposition.*

Smack Apparel Company v. Seattle Hockey Partners, LLC (dba Seattle Kraken), NHL Enterprises, LP, and National Hockey League.* United States District Court Western District of Washington. *Expert Report.*

Nike, Inc. v. StockX LLC.* United States District Court Southern District of New York. *Rebuttal Report. Deposition.*

Casa Tradición S.A. de C.V. v. Casa Azul Spirits, LLC.* United States District Court Southern District of Texas, Houston Division. *Rebuttal Report. Deposition. Trial Testimony.*

Tari Labs, LLC v. Lightning Labs, Inc.* United States District Court Northern District of California, San Francisco Division. *Expert Report.*

Edible IP, LLC and Edible Arrangements LLC* v. 1-800-Flowers.com, Inc. and 800-Flowers, Inc. United States District Court Northern District of Georgia Atlanta Division. *Expert Report. Rebuttal Report. Deposition.*

GOLO, LLC* v. Goli Nutrition Inc. United States District Court District of Delaware. *Expert Report. Reply Report. Deposition. Trial Testimony.*

NetEase, Inc., NetEase Information Technology Corporation, and Hong Kong NetEase Interactive Entertainment Limited, v. Krafton, Inc. and PUBG Santa Monica, Inc.* Superior Court of California, County of Alameda. *Expert Report. Reply Report. Deposition. Trial Testimony.*

Class Action Matters

Tamika Miller and Julianne Chuanroong, individually and on behalf of themselves, the general public, and those similarly situated, v. Travel Guard Group, Inc., AIG Travel, Inc., And National Union Fire Insurance Company of Pittsburgh, PA.* United States District Court for the Northern District of California. *Expert Report. Reply Declaration. Deposition.*

Bruce Puterbaugh v. Oorah, Inc.,; Kars4Kids, LLC (Erroneously Sued Herein as Kars4Kids and J.O.Y. of Our Youth) and DOES 1-50.* United States District Court for the Central District of California. *Expert Report. Rebuttal Report. Deposition.*

Tammy La Barbera v. Olé Mexican Foods, Inc.* United States District Court for the Central District of California. *Rebuttal Report. Deposition.*

Tamara Moore, Greta Ervin, Raff Arando, Nichols Smith, Renee Edgren, and Cynthia Welton, on behalf of themselves and all others similarly situated, v. Mars Petcare US, Inc, Hill's Pet Nutrition, Inc., and Royal Canin USA, Inc.* United States District Court for the Northern District of California. *Expert Report.*

Tiffany Coleman, Keli Swann, and Heather Brooke, individually and on behalf of all others similarly situated, v. Britax Child Safety Inc.* United States District Court of South Carolina, Rock Hill Division. *Expert Report. Deposition.*

William Rushing and Elizabeth Perlin, individually and on behalf of all others similarly situated, v. Williams-Sonoma, Inc.* United States District Court for the Northern District of California, San Francisco Division. *Expert Report. Reply Report.*

Kevin Shenkman v. Tesla, Inc. and DOES 1 to 50, inclusive.* Superior Court of California, County of Alameda. *Expert Report. Deposition.*

Other Matters

Apple Inc.* v. Masimo Corporation and Sound United, LLC; Ceracor Laboratories, Inc. United States District Court for the District of Delaware. *Rebuttal Report. Deposition.*

Hawaii Foodservice Alliance, LLC v. Meadow Gold Dairies Hawaii, LLC, Hollandia Dairy, Inc., Heritage Distributing Company (dba Ninth Avenue Foods), and Saputo Dairy Foods USA, LLC.* United States District Court for the District of Hawaii. *Rebuttal Report. Deposition.*

Moxie Pest Control* v. Kyle Nielsen, et.al. United States District Court for the District of Utah, Central Division. *Expert Report. Reply Report. Deposition.*

AliveCor, Inc. v. Apple Inc.* United States District Court Northern District of California. *Expert Report. Deposition.*

2022

Intellectual Property Matters

Sports Marketing Monterrey Group, LLC* v. Socios Services US Inc., and Mediarex Enterprises Limited. United States District Court for the Northern District of California, San Francisco Division. *Declaration. Reply Declaration.*

Xerox Corporation (USA) v. Fujifilm Business Innovation Corp. (formerly known as Fuji Xerox Co., Ltd.) (Japan).* International Court of Arbitration of the International Chamber of Commerce. *Expert Report.*

F21 OPCO, LLC* v. AIRWAIR INTERNATIONAL LTD. United States District Court for the Central District of California, Western Division. *Expert Report. Rebuttal Report. Deposition.*

Florida Virtual School v. K12 Inc., and K12 Florida LLC.* United States District Court Middle District of Florida Orlando Division. *Expert Report. Deposition.*

ImprimisRX, LLC* v OSRX, Inc.; Ocular Science, Inc., United States District Court Southern District of California. *Expert Report. Deposition.*

WSOU Investments, LLC d/b/a Brazos Licensing and Development v. Dell Technologies, Inc., Dell Inc., and EMC Corporation.* (Case No. 6:20-cv-473-ADA). United States District Court Western District of Texas Waco Division. *Expert Report. Deposition.*

Bluebonnet Internet Media Services, LLC* v. Pandora Media, LLC. United States District Court Western District of Texas Waco Division. *Expert Report.*

In re Application of Wine.com LLC.* United States Patent and Trademark Office before the Trademark Trial and Appeal Board. *Expert Report.*

Bilt Technologies, Inc. v. BILT, Inc.* United States District Court for The Southern District of New York. *Expert Report. Rebuttal Report. Deposition.*

Sazerac Brands, LLC* v. Eagle Trace Brewing Company LLC. United States Patent and Trademark Office before the Trademark Trial and Appeal Board. *Expert Report.*

UV RML NL ASSETS LLC* v. Coulter Ventures LLC. United States District Court Central District of California. *Expert Report. Rebuttal Report.*

Tortilla Factory, LLC v. GT's Living Foods, LLC.* United States District Court for The Central District of California. *Expert Report. Trial Testimony.*

Sazerac Brands, LLC* v. Buffalo City Distillery, LLC. United States Patent and Trademark Office before the Trademark Trial and Appeal Board. *Expert Report. Deposition.*

Thrive Natural Care, Inc. v. Le-Vel Brands, LLC.* United States District Court Central District of California, Southern Division. *Expert Report. Deposition.*

Crystal Lagoons U.S. Corp and Crystal Lagoons Technologies, Inc. v. Desert Color Manager LLC, Desert Color St. George LLC, AJ Construction, Inc., Cole West Home LLC, Holmes Homes, Inc., Sullivan Homes LLC, and Pacific Aquascape International, Inc.* United States District Court District of Utah, Central Division. *Expert Report.*

Sazerac Brands, LLC,* v. Buffalo Chip Campground, LLC. United States Patent and Trademark Office before the Trademark Trial and Appeal Board. *Expert Report.*

Nichino America, Inc., v. Valent U.S.A., LLC.* United States District Court District of Delaware. *Expert Report. Reply Report. Deposition.*

Promotion in Motion Inc.,* v. The J.M. Smucker Company. United States District Court District of New Jersey. *Rebuttal Report.*

Chartwell Studio Inc., v. Team Impressions, Inc., and The Peel People, LLC.* United States District Court Northern District of Illinois Eastern Division. *Rebuttal Report. Deposition.*

Brooks Sports, Inc.* v. SPARC Group, LLC, Authentic Brands Group LLC, BB IPCO, LLC, BB OPCO, LLC., Simon Property Group, Inc., Simon Property Group, L.P. United States District Court Western District of Washington at Seattle. *Expert Report.*

Shanghai Zhenglang Technology Co., Ltd,* v. Mengku Technology Co., Ltd, and Qianan Li. United States District Court Eastern District Of New York. *Rebuttal Report.*

Harman International Industries, Inc.,* v. Jem Accessories, Inc. United States District Court for the Central District of California. *Expert Report.*

PepsiCo* v. Rockstar Industries, LLC. United States Patent and Trademark Office before the Trademark Trial and Appeal Board. *Expert Report.*

EBIN New York v. SIC Enterprise, Inc.* United States District Court Eastern District of New York. *Expert Report. Rebuttal Report. Deposition.*

Aqua Connect, Inc. and Strategic Technology Partners, LLC. v. TeamViewer US, LLC.* United States District Court District of Delaware. *Expert Report. Deposition. Trial Testimony.*

R80 LLC* v. Société des Produits Nestlé S.A., et al. United States District Court District of Maryland Southern Division. *Expert Report. Rebuttal Report.*

H&R Block, Inc.,* and HRB Innovations, Inc. v. Block, Inc. United States District Court Western District of Missouri. *Rebuttal Declaration. Reply Declaration. Expert Report.*

Vans, Inc. and VF Outdoor, LLC v. Walmart, Inc., The Doll Maker, Inc., and Trendy Trading, LLC.* United States District Court Central District of California Southern Division. *Declaration.*

Warner Bros. Entertainment Inc. v. Brian Biggs, Dawn Biggs, and Random Tuesday, Inc. et al.* United States District Court Central District of California. *Expert Report. Deposition.*

Class Action Matters

Ann Kenney, individually v. Fruit of the Earth, Inc., CVS Pharmacy, Inc.* United States District Court Southern District of California. *Expert Report.*

Holly Blaine Vanzant, and Sherry Nevius, on behalf of themselves and all others similarly situated v. Hill's Pet Nutrition, Inc. and PetSmart, LLC.* United States District Court for the Northern District of Illinois. *Expert Report. Deposition.*

In re: National Football League Sunday Ticket Antitrust Litigation. United States District Court Central District of California. *Expert Report. Deposition. Rebuttal Report. Expert Report. Rebuttal Report. Deposition.*

Kimberly Banks and Carol Cantwell v. R.C. Bigelow, Inc., and Does 1 through 10.* United States District Court Central District of California. *Rebuttal Report. Deposition.*

Mocha Gunaratna and Renee Camenforte v. Dr. Dennis Gross Skincare, LLC.* United States District Court Central District of California. *Expert Report. Deposition.*

Paul Orshan, Christopher Endara, David Henderson, and Steven Neocleous, v. Apple Inc.* United States District Court Northern District of California. *Expert Report. Deposition.*

Elizabeth Maisel v. S. C. Johnson, Inc.* United States District Court Northern District of California. *Expert Report.*

Other Matters

United States ex rel. Terrence Barrett, and on behalf of various States* v. Allergan, Inc. United States District Court Central District of California. *Expert Report.*

2021

Intellectual Property Matters

Power Home Remodeling Group, LLC* v. Power Home Solar LLC d/b/a Powerhome Solar, also d/b/a Powerhome Solar & Roofing, also d/b/a Power Home Solar and Roofing. United States District Court Eastern District of Pennsylvania. *Expert Report*.

Honda Motor Co., LTD., v. Microsoft Corporation.* United States Patent and Trademark Office before the Trademark Trial and Appeal Board. *Expert Report*.

Kaifi LLC v. T-Mobile US, Inc.; LAYER3 TV, Inc.; L3TV Dallas Cable System, LLC; METROPCS Texas, LLC; T-Mobile License LLC; T-Mobile USA, INC.; T-Mobile West LLC; T-Mobile West Tower LLC; IBSV LLC; Theory Mobile, Inc.; T-Mobile PCS Holdings LLC; T-Mobile Resources Corporation; and T-Mobile Subsidiary IV Corporation.* United States District Court Eastern District of Texas Marshall Division. *Expert Report. Deposition*.

Premier Specialty Brands LLC, d/b/a Kamado Joe v. Dansons US, LLC and Dansons, Inc. d/b/a Louisiana Grills.* United States District Court for the Northern District of Atlanta, Georgia Division. *Expert Report. Deposition*.

Crocs, Inc.* v. Effervescent, Inc. et. al. United States District Court for the District of Colorado. *Expert Report. Deposition*.

Theia Technologies LLC v. Theia Group, Inc. and Theia Holdings A, Inc.* United States District Court for the Eastern District of Pennsylvania. *Expert Report*.

Lambda Labs, Inc.* v. Lambda Inc.* United States District Court for the Northern District of California Oakland Division. *Expert Report*.

Storage Cap Management LP* v. Robarco, Inc. and SpareSpace Storage, LLC. United States District Court for the Southern District of Ohio Eastern Division. *Expert Report. Deposition*.

Clear Imaging Research, LLC v. Samsung Electronics Co. LTD and Samsung Electronics America.* *Expert Report. Deposition*.

Patagonia, Inc. and Patagonia Provisions, Inc. v. Anheuser-Busch, LLC dba Patagonia Brewing Co.* United States District Court for the Central District of California Western Division, Los Angeles. *Expert Report*.

In the Matter of Certain Audio Players and Controllers, Components Thereof, and Products Containing the Same. United States International Trade Commission, Washington DC. *Expert Report. Deposition. Trial Testimony*.

Vivint Inc.* v. Alarm.com. United States District Court for the District of Utah. *Expert Report. Deposition*.

Class Action Matters

Kristen Schertzer, Meagan Hicks, Brittany Covell* v. Bank of America, N.A., Cardtronics, Inc., FCTI, Inc., Cash Depot, Ltd. And DOES 1-50. United States District Court Southern District of California. *Expert Report. Deposition.*

Warren Gross, Deborah Levin, Shelby Cooper, and Edward Buchanan v. Vilore Foods Company, Inc., Arizona Canning Company, LLC.* United States District Court Southern District of California. *Expert Report. Rebuttal Report. Deposition.*

Scott and Rhonda Burnett, Ryan Hendrickson, Jerod Breit, Scott Trupiano, and Jeremy Keel v. The National Association of Realtors, Realogy Holdings Corp., Homeservices of America, Inc., BHH Affiliates, LLC, HSF Affiliates, LLC, Re/Max LLC, and Keller Williams Realty, Inc.* United States District Court for the Western District of Missouri, Western Division. *Expert Report.*

In re: Marriott International, Inc., Customer Data Security Breach Litigation. United States District Court of Maryland, Southern Division. *Expert Report. Deposition.*

Christopher Julian et. al. v. TTE Technology, Inc., dba TCL North America.* United States District Court for the Northern District of California. *Expert Report.*

Kaylan Morris, et. al. v. Walmart Inc., f/k/a/ Wal-mart Stores Inc.* United States District Court, Northern District of Alabama, Southern Division. *Expert Report. Deposition. Class Certification Testimony.*

Ricardo R. Garcia, Duane K. Glover, Paul E. Jacobson, Gaetano Calise, Mykhalo I. Holovatyuk, Brian Garcia, Paul Thompson, and David Hartman* v. Volkswagen Group of America, Inc. a/k/a Audi of America, Inc. and Volkswagen Aktiengesellschaft. United States District Court for the Eastern District of Virginia, Alexandria Division. *Expert Report. Deposition.*

Charles Tillage and Joseph Loomis* v. Comcast Corporation and Comcast Cable Communications, LLC and Does 1-20. United States District Court for the Northern District of California, San Francisco Division. *Expert Report.*

Kathleen Ryan-Blaufuss, Cathleen Mills, and Khek Kuan v. Toyota Motor Corporation, Toyota Motor Sales, U.S.A., INC., and DOE Defendants 1-10.* United States District Court for the Central District of California, Western Division. *Expert Report. Deposition.*

H. Cristina Chen-Oster, Shanna Orlich, Allison Gamba, and Mary De Luis* v. Goldman Sachs & Co. and The Goldman Sachs Group, Inc. United States District Court for the Southern District of New York. *Expert Report. Deposition.*

Michael Testone, Collin Shanks, and Lamartine Pierre, et. al., v. Barlean's Organic Oils, LLC.* United States District Court Southern District of California. *Expert Report. Deposition.*

Susan Wang Rene Lee v. StubHub, Inc.* Superior Court of the State of California for the County of San Francisco. *Expert Report*.

Michael Madea and Rick Smith, et. al, v. Kennedy Endeavors, Inc.* United States District Court for the District of Hawai'i. *Expert Report. Deposition*.

Shelly Benson and Lisa Caparelli, et. al, v. Newell Brands, Inc.* United States District Court for the Northern District of Illinois. *Expert Report. Deposition*.

Thomas Bailey, et. al, v. Rite Aid Corporation.* United States District Court for the Northern District of California. *Expert Report. Deposition*.

2020

Intellectual Property Matters

What A Smoke, LLC v. Duracell U.S. Operations, Inc.* United States District Court District of New Jersey. *Expert Report. Deposition*.

Nirvana LLC v. Marc Jacobs International LLC.* United States District Court Central District of California. *Expert Report. Deposition*.

Girl Scouts of the United States of America* v. Boy Scouts of America. United States District Court Southern District of New York. *Expert Report. Deposition*.

American Dairy Queen Corporation v. W. B. Mason Co. Inc.* United States District Court for the District of Minnesota. *Expert Report. Deposition. Trial Testimony*.

Seven Networks, LLC v. Apple Inc.* United States District Court for the Eastern District of Texas Marshall Division. *Expert Report. Deposition*.

New NGC, Inc. d/b/a National Gypsum Company, NGC Industries, LLC, and National Gypsum Properties,* LLC v. Alpinebay, Inc. *Expert Report. Deposition. Trial Testimony*.

Glaxo Group Limited* v. Respirent Pharmaceuticals Co., LTD. United States District Court Southern District of New York. *Expert Report*.

Kaifi LLC v. AT&T Inc.; AT&T Corp.; AT&T Communications, LLC; AT&T Mobility, LLC; and AT&T Services, Inc.* United States District Court Eastern District of Texas Marshall Division. *Expert Report. Deposition*.

CFA Institute v. American Society of Pension Professionals & Actuaries, et. al.* United States District Court for the Western District of Virginia, Charlottesville Division. *Expert Report. Deposition*.

Match Group LLC* v. Bumble Trading Inc., Bumble Holding, LTD., Badoo Trading Limited, Magic Lab Co., Worldwide Vision Limited, Badoo Limited, Badoo Software Limited, and Badoo Technologies Limited. United States District Court for the Western District of Texas, Waco Division. *Expert Report. Deposition.*

ClearPlay, Inc. v. Dish Network, L.L.C. and Echostar Technologies, L.L.C.* United States District Court, District of Utah, Central Division. *Expert Report.*

Class Action Matters

Vicky Maldonado, et. al., v. Apple, Inc.* United States District Court, Northern District of California, San Francisco Division. *Expert Report. Deposition.*

Jason DeCarlo v. Costco Wholesale Corporation and MBNR.* United States District Court Southern District of California. *Expert Report.*

Javier Cardenas et al., Plaintiffs v. Toyota Motor Corporation et al., Defendants.* United States District Court Southern District of Florida. *Expert Report. Deposition. Trial Testimony.*

Brian Gozdenovich et al., v. AARP Inc., AARP Services, Inc., AARP Insurance Plan, UnitedHealth Group, Inc., and UnitedHealthCare Insurance Company.* United States District Court District of New Jersey. *Expert Report.*

Barbara Lewis, et al., v. Rodan & Fields, LLC.* United States District Court Northern District of California Oakland Division. *Expert Report. Deposition.*

Austin Rugg v. Johnson & Johnson Consumer Inc.* United States District Court Northern District of California San Jose Division. *Expert Report.*

Caryn Gorzo, et al., v. Rodan & Fields, LLC.* The Superior Court of California County of San Francisco. *Expert Report.*

Toya Edwards and Jamal Erakat, et al., v. Walmart, Inc.* United States District Court, Central District of California. *Expert Report. Deposition.*

Ohio State Troopers Association, Inc., et al., & Miguel Porras v. Point Blank Enterprises, Inc.* United States District Court, Southern District of Florida. *Expert Report. Deposition.*

Other Matters

TreeHouse Foods, Inc., Bay Valley Foods, LLC, and Strum Foods, Inc.,* v. Keurig Green Mountain, Inc. United States District Court for the Southern District of New York. *Expert Reports. Deposition.*

2019

Intellectual Property Matters

Sazerac Brands, LLC* v. Bullshine Distillery, LLC. In the United States Patent and Trademark Office Before the Trademark and Trial Appeal Board. Opposition No. 91227653. *Expert Report. Deposition.*

X One* v. Uber Technologies, Inc. United States District Court Northern District of California. *Expert Report. Deposition.*

NIKE, Inc. v. Skechers U.S.A., Inc.* United States District Court, Central District of California. *Expert Report. Deposition.*

Vital Pharmaceuticals, Inc. v. Monster Energy Company and Reign Beverage Company, LLC.* United States District Court Southern District of Florida. *Expert Report. Deposition.*

Mahindra & Mahindra, Ltd. and Mahindra Automotive North America, Inc.* v. FCA US LLC. United States District Court, Eastern District of Michigan. *Expert Report. Deposition. ITC Trial Testimony.*

Rex Real Estate I, L.P., v. Rex Real Estate Exchange, Inc.* United States District Court for the Eastern District of Texas, Sherman Division. *Expert Report.*

adidas America, Inc., et al. v. Forever 21 Inc., et al.* United States District Court District of Oregon Portland Division. *Expert Report.*

Lodestar Anstalt v. Bacardi & Company Limited, Bacardi U.S.A., Inc., and Bacardi Limited.* United States District Court Central District of California, Western Division. *Expert Report. Deposition.*

Class Action Matters

Paul Stockinger et al. v. Toyota Motor Sales, U.S.A., Inc.* United States District Court Central District of California. *Expert Report. Deposition.*

Thomas Allegra, et. al.* v. Luxottica Retail North America, d/b/a LensCrafters, United States District Court, Eastern District of New York, Brooklyn Division. *Expert Report. Deposition.*

Collin Shanks v. Jarrow Formulas, Inc.* United States District Court Central District of California. *Expert Report.*

Crystal Hilsley vs. Ocean Spray Cranberries, Inc.*, Arnold Worldwide LLC. United States District Court Western District Southern District of California. *Expert Report. Deposition.*

Erin Allen et al. v. Conagra Foods Inc.* United States District Court Northern District of California San Francisco Division. *Expert Report. Deposition.*

Riley Johannessohn, Daniel C. Badilla, James Kelley, Ronald Krans, Kevin R. Wonders, William Bates, James Pinion* v. Polaris Industries, Inc. United States District Court District of Minnesota. *Expert Report. Deposition.*

Other Matters

In re: Windstream Holdings, Inc., et al., Debtors. Windstream Holdings Inc., et. al.* v. Charter Communications, Inc. and Charter Communications Operating, LLC. United States Bankruptcy Court, Southern District of New York. Chapter 11, Case No. 19-22312 (RDD). *Expert Report.*

Belcher Pharmaceuticals, LLC v. Hospira, Inc.* United States District Court for the Middle District of Florida, Tampa Division. *Expert Report. Deposition.*

State of Washington* v. TVI, INC., d/b/a Value Village. State of Washington King County Superior Court. *Expert Report. Deposition. Trial Testimony.*

Obagi Cosmeceuticals LLC* v. ZO Skin Health, Inc. and Zein E. Obagi, M.D. JAMS Arbitration Proceeding. *Expert Report. Deposition. Arbitration Testimony.*

James Pudlowski, Louis C. Cross, III, Gail Henry, Steve Henry v. St. Louis Rams, LLC, St. Louis Rams Partnership, ITB Football Company, LLC.* *Expert Report.*

People of the State of California vs. The Hertz Corporation, American Traffic Solutions, Inc., ATS Processing Services, L.L.C., American Traffic Solutions Consolidated, L.L.C., PlatePass, L.L.C.* *Deposition.*

2018

Intellectual Property Matters

Spangler Candy Company vs. Tootsie Roll Industries, LLC.* United States District Court Northern District of Ohio Western Division Toledo. *Expert Report. Deposition.*

American Automobile Association of Northern California, Nevada & Utah and A3 Mobility LLC v. General Motors LLC and Maven Drive LLC.* United States District Court Northern District of California San Jose Division. *Expert Report. Deposition.*

Merck & Co., Inc., and Merck Sharp & Dohme Corp. v. Merck KGaA*. United States District Court District of New Jersey. *Expert Report. Deposition.*

MZ Wallace Inc. v. Sue Fuller, d/b/a/ The Oliver Thomas, and Black Diamond Group, Inc.* United States District Court Southern District of New York. *Expert Report. Deposition.*

Newmark Realty Capital, Inc.* v. BCG Partners, Inc. United States District Court Northern District of California San Jose Division. *Expert Report. Deposition.*

Advice Interactive Group, LLC* v. Web.Com Group, Inc. United States District Court for the Middle District of Florida Jacksonville Division. *Expert Report. Deposition.*

Global Brand Holdings, LLC* v. Church & Dwight Co., Inc. United States District Court Southern District of New York. *Expert Report. Deposition.*

Forever 21, Inc.* v. Gucci America, Inc., and Guccio Gucci S.p.A. United States District Court Central District of California Western Division. *Expert Report. Deposition.*

Masterbuilt Manufacturing, LLC v. Wal-Mart Stores, Inc.* United States District Court for the Middle District of Georgia Columbus Division. *Expert Report. Deposition.*

Strategic Partners, Inc.* v. Koi Design, LLC. United States District Court Central District of California. *Expert Report.*

Hard Rock Café International (USA), Inc., and Tarsadia Hotels v. RockStar Hotels, Inc.* United States District Court for the Southern District of Florida Fort Lauderdale Division. *Expert Report.*

Ghostbed, Inc. and Werner Media Partners, LLC d/b/a Nature's Sleep, LLC v. Casper Sleep, Inc., Red Antler, LLC and ICS, Inc.* United States District Court for the Southern District of Florida. *Expert Report. Deposition.*

Class Action Matters

Kaylee Browning and Sarah Basile v. Unilever United States, Inc.* United States District Court Central District of California. *Expert Report. Deposition.*

Scott R. Bernard v. Public Power, LLC.* In the Circuit Court of Cook County, Illinois County Department, Chancery Division. *Expert Report.*

Kristian Zamber v. American Airlines, Inc.* United States District Court Southern District of Florida Miami Division. *Expert Report. Deposition.*

Thomas Blitz v. Monsanto Company.* United States District Court Western District of Wisconsin. *Expert Report. Deposition.*

Other Matters

State of Washington* v. Johnson & Johnson, Ethicon, Inc. Ethicon US, LLC. King County Superior Court State of Washington. *Expert Report.*

Steven A. Conner DPM, P.C. v. Optum 360, LLC.* United States District Court Eastern District of Pennsylvania. *Expert Report. Deposition.*

State of Washington* v. Comcast Cable Communications Management, LLC, et. al. State of Washington King County Superior Court. *Expert Report. Deposition. Trial Testimony.*

Josephine James Edwards v. Hearst Communications, Inc.* United States District Court for the Southern District of New York. *Expert Report. Deposition.*

2017

Intellectual Property Matters

Shelia Dashnaw, et. al. v. New Balance Athletics, Inc.* United States District Court Southern District of California. *Expert Report. Deposition.*

Tri-Union Seafoods, LLC v. Otis McAllister, Inc.* United States Patent and Trademark Office before the Trademark Trial and Appeal Board. *Expert Report.*

Michael Kors, L.L.C.* v. Chunma USA, Inc. United States District Court Central District of California. *Expert Report. Deposition.*

Weems Industries, Inc. v. Plews, Inc.* United States District Court for Northern District of Iowa, Cedar Rapids Division. *Expert Report. Deposition.*

Mars Incorporated and Mars, Petcare US, Inc. v. The J. M. Smucker Company and Big Heart Pet, Inc.* United States District Court for the Eastern District of Virginia. *Expert Report. Deposition.*

Professional Liability Insurance Services, Inc. v. U.S. Risk, Inc. and Crystal Jacobs.* United States District Court for Western District of Texas, Austin Division. *Expert Report. Deposition.*

Luxe Hospitality Company, Inc.* v. SBE Entertainment Group. United States District Court Central District of California. *Expert Report. Deposition.*

Class Action Matters

Martin Schneider, et. al. v. Chipotle Mexican Grill, Inc.* United States District Court Northern District of California. *Expert Report. Deposition.*

Trevor Singleton et. al. v. Fifth Generation, Inc. d/b/a Tito's Handmade Vodka.* United States District Court for the Northern District of New York. *Expert Report. Deposition.*

Other Matters

State of Arizona v. Volkswagen AG, et. al.* Superior Court of the State of Arizona – Maricopa County. *Expert Report.*

ADT LLC, and ADT US Holdings, Inc., v. Vivint, Inc.* United States District Court Southern District of Florida Palm Beach Division. *Expert Report. Deposition.*

* Retaining party

Publications and Presentations

NABE Panel – “Hypothetical Case for Challenge Panel: Using Surveys to Estimate the Value of Features in a Bundled Product.” National Association for Business Economics Transfer Pricing Symposium, Washington, DC (July 2023).

“Examining the Confusion Survey Threshold in Trademark Cases.” Debevoise and Plimpton Webinar, with David Bernstein and Christopher Ford (March 2022).

FDLI Panel – “Consumer Perceptions in Class Actions: Plaintiff Surveys, Defendant Surveys, and Everything in Between.” Food and Drug Law Institute Food Advertising, Labeling, and Litigation Conference (September 2021).

“A tale of two cups: Acquired distinctiveness and survey evidence before the TTAB.” (May-June 2020), with Healey Whitsett. *The Trademark Reporter*.

“Survey response bias and the ‘privacy paradox’: Evidence from a discrete choice experiment.” (May, 2020), with Garrett Glasgow and Samantha Iyengar in *Applied Economics Letters*. DOI: 10.1080/13504851.2020.1770183.

NAD Panel – “Consumer Perception Survey Design Safeguards & Pitfalls.” National Advertising Division Annual Meeting, New York, NY (September, 2019).

INTA Panel – “Surveys in the Brave New World: Designing and Using Survey Evidence in the Age of Online Shopping, Influencers and Hashtags.” Annual Meeting, Boston MA (May, 2019).

“The value of non-personally identifiable information to consumers of online services: evidence from a discrete choice experiment,” (2016) with Garrett Glasgow in *Applied Economics Letters*, DOI: 10.1080/13504851.2016.1197357.

“Using Survey Methods to Demonstrate the Value of Personal Information and Privacy” (May 2015) *Panel on Privacy, Security and IRBs – American Association for Public Opinion Research*, Annual Meeting, Hollywood Florida.

“Battle of the Experts—Deploying the Proper Scientific Methodology for Supporting or Challenging Claims” (March 13, 2015) invited panelist at the *Advanced Forum on Resolving & Litigating Advertising Disputes*.

“Effective Use of Surveys in Trademark Litigation,” (August, 2014) *Knowledge Group Webinar*.

“The Use of Statistical Sampling Post-Duran,” (August, 2014) *Law360*.

“The Value of Personal Information to Consumers of Online Services: Evidence from a Discrete Choice Experiment,” (June 19, 2014). *National Economic Research, Inc.*

“An assessment of the nonmarket benefits of the Water Framework Directive for households in England and Wales,” with Metcalfe, Baker, Andrews, Atkinson, Bateman, Carson, East, Gueron, Sheldon and Train in *Water Resources Research*, 48:W10516. (Paper awarded Editor’s Choice Award for 2013).

ABA Webinar “The Use of Surveys in Advertising Substantiation” (June 23, 2011).

“Meeting the New Standards for Reasonable Royalties,” (February, 2011) with Mario Lopez. *Law360*.

“Survey Evidence in False Advertising Cases,” (Winter, 2010). *The Antitrust Trial Practice Newsletter*.

“The Use of Surveys in Litigation: Recent Trends,” (April, 2010) with Kent Van Liere. National Economic Research Associates, Inc.

“Emerging Issues in the Use of Surveys in Trademark Infringement on the Web,” with Kent Van Liere. Paper published in the *Advanced Trademark & Advertising Law Conference* proceedings, September 2007, Seattle, WA.

“An Analysis of the Hypothetical Situations in Willingness to Pay Studies.” Paper presented at the July 2006 Thematic Seminar “Quality Criteria in Survey Research,” hosted by World Association for Public Opinion Research, Lake Como, Italy.

“Use of Surveys in Intellectual Property Disputes,” (2005) with Eugene P. Ericksen, in *Economic Approaches to Intellectual Property Policy, Litigation and Management Issues*, Gregory K. Leonard and Lauren J. Stiroh (eds.) National Economic Research Associates, Inc.

“Response Rate Standards: Lessons from the 2004 Presidential Polls.” Paper presented at the 2005 Annual Meeting of American Association of Public Opinion Research, Miami Beach, FL.

“Using Surveys to Determine Damages in Patent Infringement Cases” presented at *Calculating and Proving Patent Damages* workshop, March 2004 Charlotte, NC.

“Using Surveys to Determine Damages in Patent Infringement Cases” presented at *Calculating and Proving Patent Damages* workshop, January 2004 San Diego, CA.

“Using Surveys to Determine Damages in Patent Infringement Cases” presented at *Calculating and Proving Patent Damages* workshop, June 2003, McLean, VA.

Sarah Butler

Professional Associations

Member, American Association of Public Opinion Research and World Association for Public Opinion Research, Member, American Statistical Association, Member, American Bar Association, Intellectual Property Section, Member, International Trademark Association (INTA), Reviewer for *Trademark Reporter*, Member, American Marketing Association.

Exhibit B

Exhibit B

Materials Considered

Court Documents

- Plaintiff City and County of San Francisco's Notice of Motion and Motion for Preliminary Injunction Enjoining Defendants; Memorandum of Points and Authorities in Support Thereof, *City and County of San Francisco v. City of Oakland and Port of Oakland*, United States District Court for the Northern District of California, Case No. 3:24-cv-02311-TSH, dated September 17, 2024.

Expert Reports and Declarations

- Declaration of Dr. Carol A. Scott, dated October 8, 2024.
- Declaration of Sarah Butler in Support of the City's Motion for Preliminary Injunction, and accompanying exhibits, dated September 10, 2024.

Survey Literature

- Diamond, S. S. (2011). "Reference Guide on Survey Research," *Reference Manual on Scientific Evidence*, Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence; Federal Judicial Center; National Research Council, pp. 359-423.
- Bernstein, D.H. and Keller, B. P. (2022). "Survey Evidence in False Advertising Cases," *Trademark and Deceptive Advertising Surveys: Law, Science, and Design, Second Edition*, edited by Diamond, S. S., and Swann, J. B., pp. 187-235.

Websites

- <https://www.8newsnow.com/news/national-news/will-cause-confusion-san-francisco-airport-officials-push-back-against-oakland-airports-proposed-name-change/>
- <https://aviationweek.com/air-transport/airports-networks/oakland-airport-seeks-boost-inbound-traffic-name-change>
- <https://fox5sandiego.com/news/national-news/will-cause-confusion-san-francisco-airport-officials-push-back-against-oakland-airports-proposed-name-change/>
- <https://kyma.com/news/california-news/2024/04/13/oakland-city-officials-vote-on-airports-name-change/>
- <https://www.airlines.org/dataset/air-travelers-in-america-annual-survey/>
- <https://www.cnn.com/2024/05/10/travel/oakland-airport-name-lawsuit-san-francisco/index.html>
- <https://www.expedia.com/>
- <https://www.google.com/travel/flights>

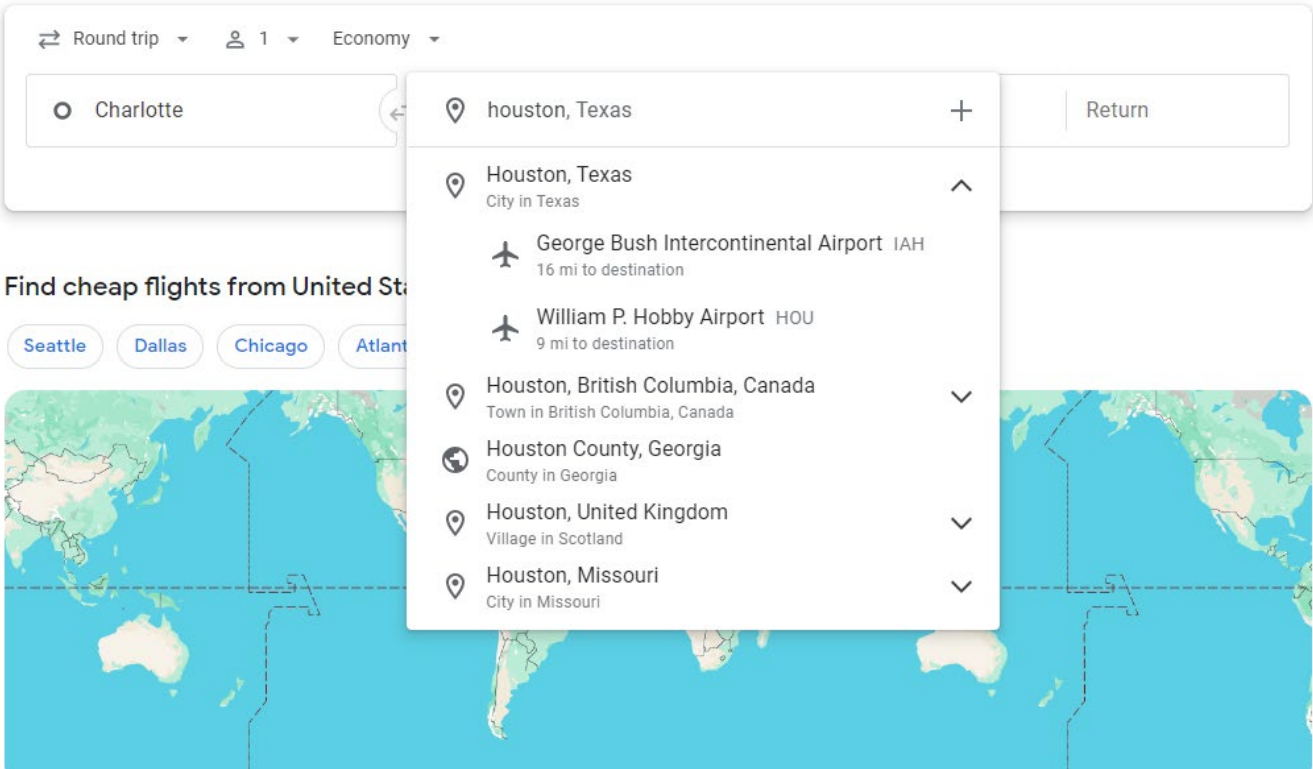
- <https://www.iflyoak.com/fly/airlines-and-destinations/>
- <https://www.kayak.com/>
- <https://www.latimes.com/california/story/2024-04-18/san-francisco-sues-oakland-over-airport-name-change>
- <https://www.southwest.com/>
- https://www.statsamerica.org/sip/rank_list.aspx?rank_label=pop1

Other Documents

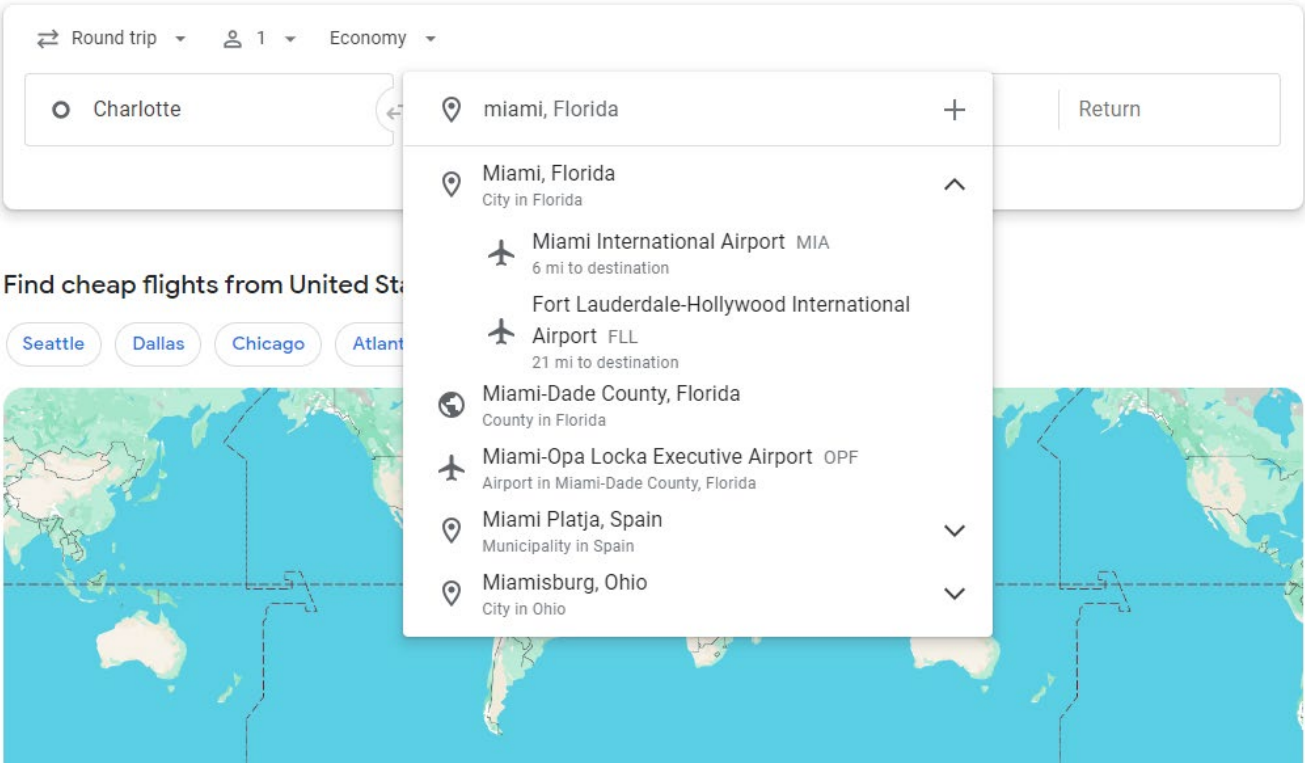
- 2024-03-29 Port Press Release.pdf
- Agenda Report.pdf
- OAK-Branding-Survey-Key-Findings.pdf

Exhibit C

Google Flight Search Result for “Houston”



Google Flight Search Result for “Miami”



Google Flight Search Result for “Chicago”

Round trip 1 Economy

Charlotte

chicago, Illinois

Chicago, Illinois

Chicago O'Hare International Airport ORD
16 mi to destination

Chicago Midway International Airport MDW
9 mi to destination

Chicago Rockford International Airport (RFD) RFD
International airport in Rockford, Illinois

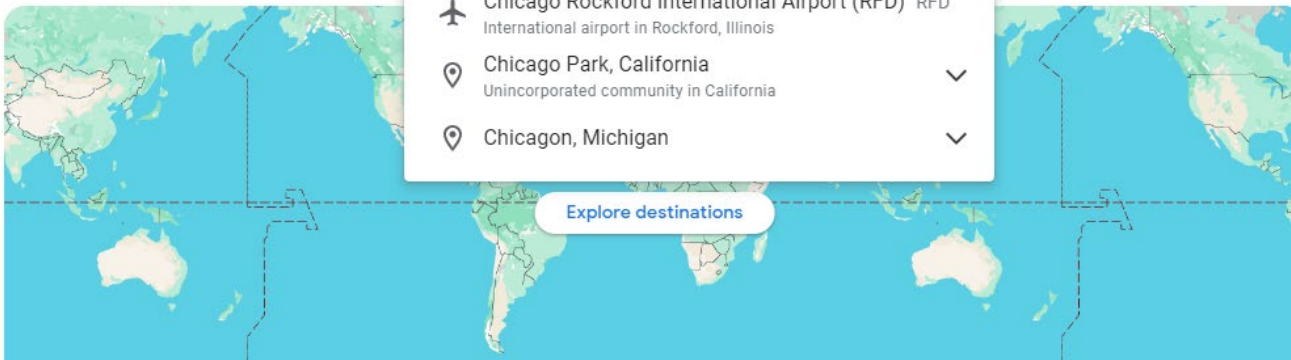
Chicago Park, California
Unincorporated community in California

Chicagon, Michigan

Explore destinations

Find cheap flights from United States

Seattle Dallas Chicago Atlanta



Google Flight Search Result for “Los Angeles”

Round trip 1 Economy

Charlotte

los angeles, California

Los Angeles, California

Los Angeles International Airport LAX
12 mi to destination

Hollywood Burbank Airport BUR
12 mi to destination

Los Angeles County, California
County in California

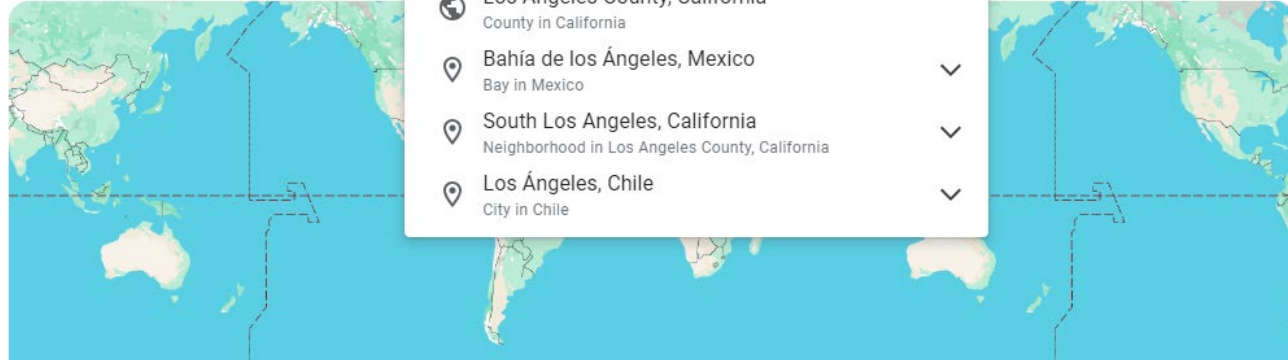
Bahía de los Ángeles, Mexico
Bay in Mexico

South Los Angeles, California
Neighborhood in Los Angeles County, California

Los Ángeles, Chile
City in Chile

Find cheap flights from United States

Seattle Dallas Chicago Atlanta



Google Flight Search Result for “Phoenix”

Round trip

1

Economy

Charlotte

phoenix, Arizona

Return

Phoenix, Arizona

City in Arizona

Phoenix Sky Harbor International Airport PHX

3 mi to destination

Phoenix-Mesa Gateway Airport AZA

25 mi to destination

Tongren Phoenix Airport TEN

Airport in China

Sanya Phoenix International Airport SYX

Airport in Sanya, China

Phoenixville, Pennsylvania

Borough in Pennsylvania

Vacoas-Phoenix, Mauritius

Town in Mauritius

Find cheap flights from United States

Seattle

Dallas

Chicago

Atlanta

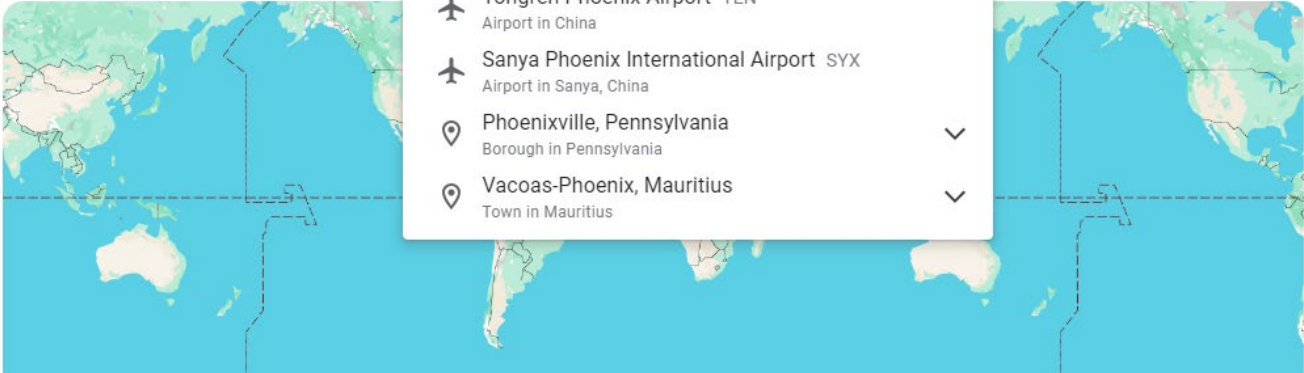


Exhibit D

Data produced in native format.

BOBBY GHAJAR (198719)
JUDD LAUTER (290945)
COOLEY LLP
3 Embarcadero, 20th Floor
San Francisco, California 94111-4004
Telephone: (415) 693-2000
Facsimile: (415) 693-2222
Email: bghajar@cooley.com
jlauter@cooley.com

DAVID CHIU (189542)
City Attorney
JESSE SMITH (122517)
Chief Assistant City Attorney
YVONNE R. MERÉ (173594)
Chief Deputy City Attorney
JULIE VEIT (209207)
CHRISTOPHER STUART (262399)
Deputy City Attorneys
City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4700
Facsimile: (415) 554-4757
Email: Cityattorney@sfcityatty.org
Jesse.Smith@sfcityatty.org
Yvonne.Mere@sfcityatty.org
Julie.Veit@sfcityatty.org
Christopher.Stuart@sfcityatty.org

Attorneys for Plaintiff and Counterclaim Defendant
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

CITY OF OAKLAND AND PORT OF
OAKLAND,

Defendants.

AND RELATED COUNTERCLAIM

Case No. 3:24-CV-02311-TSH

**SECOND DECLARATION OF MELISSA
ANDRETTA IN SUPPORT OF THE CITY'S
MOTION FOR PRELIMINARY INJUNCTION**

1 I, Melissa Tytko Andretta, declare as follows:

2 1. I am the Director of Aviation Marketing & Development at San Francisco
3 International Airport ("SFO"). I submit this declaration in connection with the City and County of
4 San Francisco's Reply Brief In Support Of Plaintiff City And County Of San Francisco's Motion
5 For Preliminary Injunction Enjoining Defendants. I declare that the following is true to the best of
6 my knowledge, information, and belief, and that if called upon to testify, I could and would testify
7 to the following.

8 2. I have extensive background in marketing within the aviation industry as Director
9 of Aviation Marketing & Development at SFO and having worked in various marketing roles for
10 Icelandair for over 12 years. One of my primarily responsibilities at SFO is international marketing
11 of the airport, which we commit approximately \$1.4 million to annually. In addition, while at
12 Icelandair I was in charge of all marketing for the Americas and the UK & Ireland.

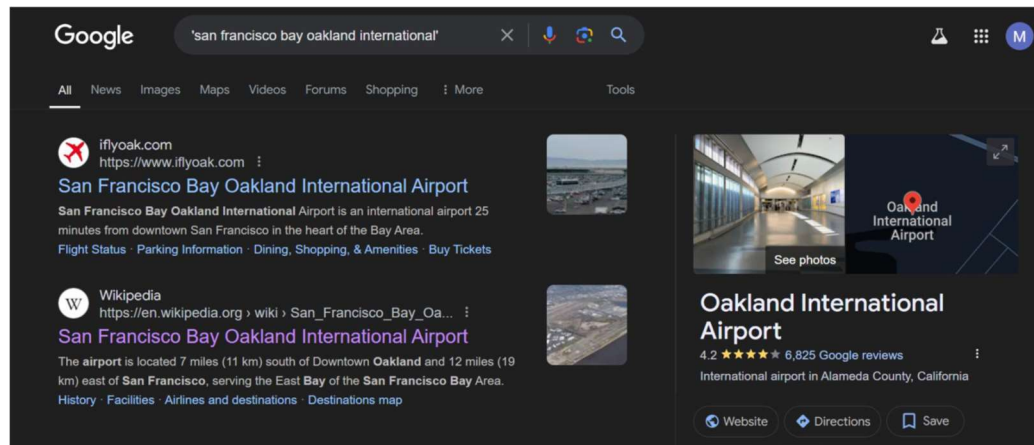
13 3. I have reviewed the Port of Oakland's (the "Port" or "Oakland") Opposition to
14 Plaintiff's Motion for Preliminary Injunction (the "Opposition") and supporting declarations.

15 4. I was not surprised to see that declarations were submitted from individuals working
16 for Southwest Airlines and Spirit Airlines. Southwest Airlines and Spirit Airlines account for
17 roughly 89% of seat capacity for flights in and out of the Oakland airport and have a close
18 relationship with the airport.

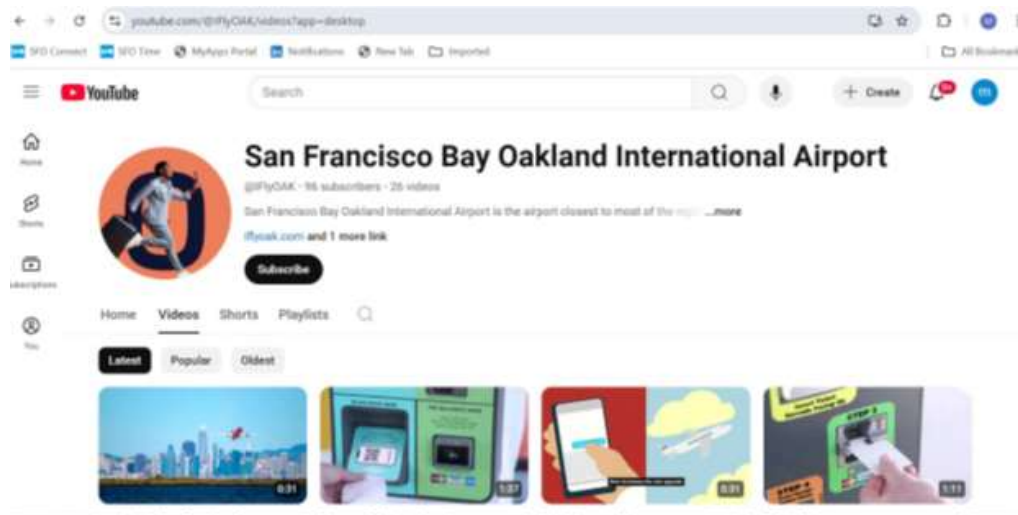
19 5. Several of the declarations submitted in support of the Opposition discuss that it is
20 industry practice for IATA codes to be displayed with airport names on websites for OT As, airlines,
21 and ticketing aggregators. Based on my experience, however, these are far from the only contexts in
22 which travelers encounter airport names. I identified several in my prior declaration, but there are
23 many others, all of which inform travelers' understanding of airport names and identities.

24 6. For example, a Google search for "San Francisco Bay Oakland International airport"
25 returns results for the airport's website and Wikipedia page, neither of which display the OAK
26 IATA code. The following is a true and correct screenshot of such a Google search.

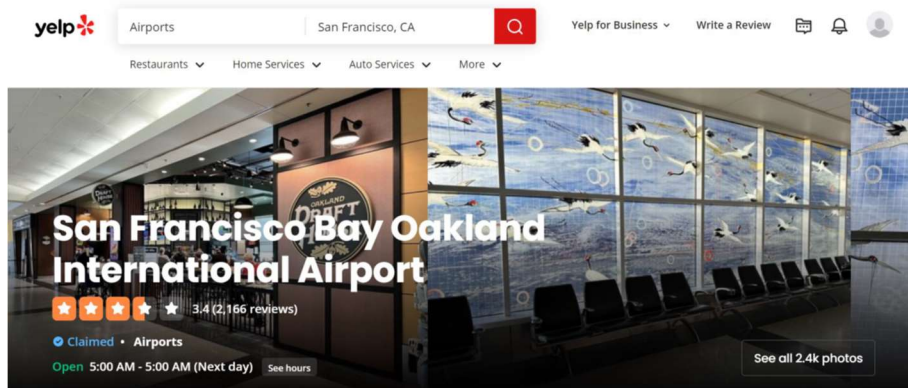
27
28



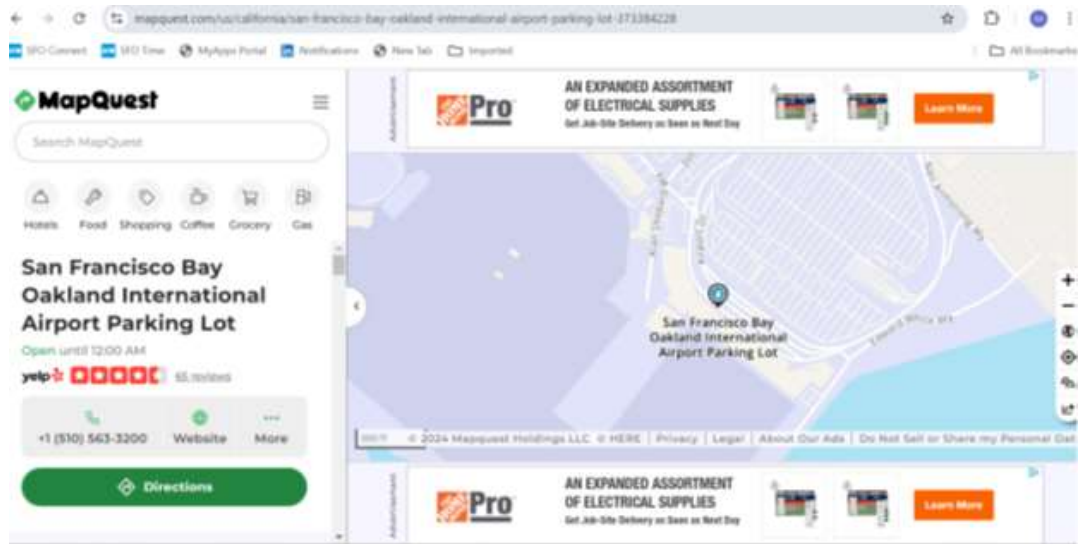
7. The Port's YouTube page for its airport also now displays the new name, and without an IATA code. The following is a true and correct screenshot of the Port's YouTube page.



8. The Port's Yelp page for its airport also now displays the SAN FRANCISCO BAY OAKLAND INTERNATIONAL AIRPORT trademark, and without an IATA code. The following is a true and correct screenshot of the Port's Yelp page for the Oakland airport.



1 9. I also conducted a search for the SAN FRANCISCO BAY OAKLAND
2 INTERNATIONAL AIRPORT on Mapquest, a popular navigation website. The airport's name is
3 again displayed without an IATA code. The following is a true and correct screenshot of a reference
4 to the Oakland airport on the Mapquest website.



14 10. As an iPhone user, I regularly use Apple Maps, and recently noticed that searches
15 for the Oakland airport return references to the SAN FRANCISCO BAY OAKLAND
16 INTERNATIONAL AIRPORT without displaying the airport's IATA code. The following is a
17 true and correct screenshot of a reference to the Oakland airport on Apple Maps.



1 11. I recently learned of yet another incident in which the SAN FRANCISCO BAY
2 OAKLAND INTERNATIONAL AIRPORT trademark resulted in confusion. On October 6, 2024,
3 I attended the Routes World Conference in Bharain. This is the world's largest conference for
4 airport aviation development teams to meet with airline network planning teams from around the
5 world. While there, I spoke to a network planner from Icelandair, who informed me that she was
6 looking forward to meeting with SFO on October 8, 2024. We have met with Icelandair many
7 times and expect them to make a return to California in 2029 when they have the aircraft to do
8 so. However, we hadn't requested a meeting with them for this Routes World. When I shared with
9 her that SFO had not requested a meeting with her airline, she looked up her meeting schedule and
10 realized that she had accepted a meeting with the "San Francisco Bay Oakland International
11 Airport" thinking she was scheduling a meeting with SFO. This individual is a sophisticated airline
12 professional whose job it is to know the industry, and yet even she was confused by the Oakland
13 airport's new name.

14
15 Executed on this 22th day of October, 2024 at San Francisco, California.

16
17 
18 _____
19 Melissa Andretta
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28

BOBBY GHAJAR (198719)
JOHN HEMANN (165823)
JUDD LAUTER (290945)
COOLEY LLP
3 Embarcadero, 20th Floor
San Francisco, California 94111-4004
Telephone: (415) 693-2000
Facsimile: (415) 693-2222
Email: bghajar@cooley.com
jhemann@cooley.com
jlauter@cooley.com

DAVID CHIU (189542)
City Attorney
JESSE SMITH (122517)
Chief Assistant City Attorney
YVONNE R. MERÉ (173594)
Chief Deputy City Attorney
JULIE VEIT (209207)
CHRISTOPHER STUART (262399)
Deputy City Attorneys
City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4700
Facsimile: (415) 554-4757
Email: Cityattorney@sfcityatty.org
Jesse.Smith@sfcityatty.org
Yvonne.Mere@sfcityatty.org
Julie.Veit@sfcityatty.org
Christopher.Stuart@sfcityatty.org

Attorneys for Plaintiff and Counterclaim Defendant
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

CITY OF OAKLAND AND PORT OF
OAKLAND,

Defendants.

AND RELATED COUNTERCLAIM

Case No. 3:24-CV-02311-TSH

**SECOND DECLARATION OF CHRIS BIRCH
IN SUPPORT OF THE CITY'S MOTION FOR
PRELIMINARY INJUNCTION**

1 I, Christopher Birch, declare as follows:

2 1. I am the Director, Guest Experience at San Francisco International
3 Airport ("SFO"). I submit this declaration in connection with the City and County of
4 San Francisco's Reply Brief In Support Of Plaintiff City And County Of San
5 Francisco's Motion For Preliminary Injunction Enjoining Defendants. I declare that
6 the following is true to the best of my knowledge, information, and belief, and that if
7 called upon to testify, I could and would testify to the following.

8 2. As discussed in my prior declaration, SFO has begun keeping a log of
9 individuals who have mistakenly shown up at SFO intending to depart from Oakland.

10 3. In the weeks since the City filed its motion for preliminary injunction,
11 this has continued to occur, and 3 additional incidents have been logged. Attached
12 hereto as **Exhibit A** is a true and correct copy of the updated daily operation log that
13 we have been maintaining of these incidents.

14
15 I declare under penalty of perjury under the laws of the United States of
16 America that the foregoing is true and correct.

17
18 Executed on this 21st day of October 2024 at San Francisco, California.

19
20 
21 _____
22 Christopher Birch

EXHIBIT A

SFO INFORMATION DESK - DAILY OPERATION LOG

New OAK Aiport name caused confusion				
	Date	Passenger Name	Contact Information (phone or email)	Comments (Flight #; Destination;Departure Time)
1	6/18/2024	Unknown	None	Spirit Airlnes - OAK/ONT
2	6/18/2024	Michelle F [REDACTED]	(209) 616 [REDACTED]	Volaris Airlines
3	6/18/2024	Venancio G [REDACTED]	(209) 509 [REDACTED]	Confirm# Y47793 / Dest: MLM/ ETD: 5:30PM
4	6/24/2024	Maria Joe F [REDACTED]	None	Spirit
5	6/25/2024	Unknown	None	Dropped off at SFO but flying out of OAK
6	7/1/2024	Rashpiinder B [REDACTED]	(209) 918 [REDACTED]	Unknown
7	7/8/2024	Erika G [REDACTED]	(209) 626 [REDACTED]	Volaris Airlines / Out of OAK
8	7/9/2024	Ruel F [REDACTED]	(702) 489 [REDACTED]	Dropped off at wrong airport
9	7/12/2024	Karla M [REDACTED]	(844) 184 [REDACTED]	Final destination / Mexico
10	7/29/2024	Pty of two	pax was rushing, didn't have time to leave name	FLT# 4409
11	7/30/2024	Tavin H [REDACTED]	702-809 [REDACTED]	Spirit Airlnes - OAK/SLC; ETD: 1402
12	8/3/2024	Pty of two	too upset didn't have time to leave names	Spirit Airlines - OAK/LAS
13	8/4/2024	Pty of one	None	Volaris Airlines
14	8/21/2024	Victor G [REDACTED]	310-408 [REDACTED]	(Spirit) NK1479/ Destination: San Diego
15	8/22/2024	Elijah F [REDACTED]	401-808 [REDACTED]	Unknown
16	8/23/2024	Pty of One	None	Dropped off by Uber to SFO but needed to go to SF Bay Oakland Airport
17	9/3/2024	Pty of One	None	Ran off too fast / Traveling on Spirit out of OAK
18	9/5/2024	Pty of two	None	Traveling on Spirit/ mistaken SFO for Oak
19	9/14/2024	Jordi A [REDACTED]	[REDACTED]	Traveling on Spirit out of OAK
20	9/26/2024	Unknown	None	Southwest from Oakland
21	9/30/2024	Pty of two	None	Spirit Airlines out of OAK / Pax were in rushed to leave didn't leave their info.
22	10/2/24	Maria N [REDACTED]	None	Spirit flight #73
23	10/2/24	Michel F [REDACTED]	None	Spirit flight #73
24				
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29				

BOBBY GHAJAR (198719)
JUDD LAUTER (290945)
COOLEY LLP
3 Embarcadero, 20th Floor
San Francisco, California 94111-4004
Telephone: (415) 693-2000
Facsimile: (415) 693-2222
Email: bghajar@cooley.com
jlauter@cooley.com

DAVID CHIU (189542)
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JESSE SMITH (122517)
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YVONNE R. MERÉ (173594)
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JULIE VEIT (209207)
CHRISTOPHER STUART (262399)
Deputy City Attorneys
City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4700
Facsimile: (415) 554-4757
Email: Cityattorney@sfcityatty.org
Jesse.Smith@sfcityatty.org
Yvonne.Mere@sfcityatty.org
Julie.Veit@sfcityatty.org
Christopher.Stuart@sfcityatty.org

Attorneys for Plaintiff and Counterclaim Defendant
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

CITY OF OAKLAND AND PORT OF
OAKLAND,

Defendants.

AND RELATED COUNTERCLAIM

Case No. 3:24-CV-02311-TSH

**SECOND DECLARATION OF CHARLES
SCHULER IN SUPPORT OF THE CITY'S
MOTION FOR PRELIMINARY INJUNCTION**

1 I, Charles Schuler, declare as follows:

2 1. I am the Director, Marketing & Communications, External Affairs at San Francisco
3 International Airport (“SFO”). I submit this declaration in connection with the City and County of
4 San Francisco’s Reply Brief In Support Of Plaintiff City And County Of San Francisco’s Motion
5 For Preliminary Injunction Enjoining Defendants. I declare that the following is true to the best of
6 my knowledge, information, and belief, and that if called upon to testify, I could and would testify
7 to the following.

8 2. I have a Master of Tourism Administration degree from George Washington
9 University and have worked for most of my career in the air travel industry.

10 3. I have been Director, Marketing & Communications, External Affairs for SFO for
11 nearly fourteen years. Prior to that, I was a sales manager with Emirates Airline for one year, the
12 Director, Strategy, Business Development & Planning – The Americas for Air New Zealand for
13 five years and seven months, and had various roles and responsibilities for United Airlines,
14 including sales, revenue management, and network planning during my nearly nine year tenure
15 there. In total, I have nearly 30 years of experience working in the industry.

16 4. From my years of experience working within the industry, and in particular in
17 marketing roles, I am knowledgeable about how air travel and airports are marketed and promoted
18 to build brand awareness, as well as how air travelers respond to marketing.

19 5. I have reviewed the Port of Oakland’s (the “Port”) Opposition to Plaintiff’s Motion
20 for Preliminary Injunction, including the supporting declarations. Many statements made by the
21 Port and its declarants about the Port’s marketing under the SAN FRANCISCO BAY OAKLAND
22 INTERNATIONAL AIRPORT trademark are misleading.

23 6. Dr. Sabine Reim describes herself as specializing in “network strategies and route
24 development.” From an airport perspective, these are common industry terms that refer to _the
25 ability to attract new airlines, new cities served and increase airline capacity on existing routes. In
26 general, work in this area is usually part of an airport’s proposal to airlines, and not directly related
27 to consumer marketing or consumer behavior. From my experience, once an airline decides to
28 operate a route, the consumer-facing promotional activations are usually handed from network

1 planning to the respective sales and marketing teams of the airline, airport, and tourism partners.

2 7. I concur with Dr. Reim that the vast majority of airfare bookings occur online. And
3 therefore how you are displayed online is important.

4 8. Based on data that I have reviewed, most travelers who purchase airfare online use
5 OTAs as a resource. While some airline websites do not display airport names in their entirety,
6 or only inconsistently do so, many of the most popular OTA sites (e.g. booking.com, priceline.com,
7 and trip.com) display airport names in their entirety within search results. This is just one of the
8 many ways that consumers encounter airport names outside of the context of airline websites prior
9 to purchasing airfare.

10 9. Based on my years of experience in marketing within the air travel industry,
11 travelers also become familiar with airport names prior to making purchases by encountering them
12 in advertising and other media such as news articles, and this background can inform traveler's
13 impressions of an airport. At SFO, we actively promote our airport's name, at times without an
14 IATA code, through advertising campaigns to raise brand awareness and highlight the benefits of
15 choosing us. These benefits include a wide range of destinations, a diverse selection of airlines,
16 convenience, top-tier services and amenities, local job opportunities, and our commitment to
17 sustainability initiatives. We would not do this if we did not believe that it has an impact on
18 travelers.

19 10. As an example, we have been running audio advertisements for SFO on KQED, a
20 local radio station. These advertisements refer to "San Francisco International Airport" and do not
21 mention our IATA code. Notably, the Port runs similar advertisements on KQED. In each of the
22 recordings, the Port refers to its airport as SAN FRANCISCO BAY OAKLAND
23 INTERNATIONAL AIRPORT without any reference to the airport's IATA code. A true and
24 correct screenshot from tveyes.com, a media monitoring tool, is attached hereto as **Exhibit A**. This
25 screenshot displays relevant excerpts from the transcript of the Port's advertisements.

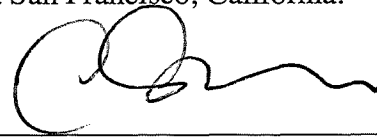
26 11. Dr. Reim states that an airport's name "can be a useful tool for creating general
27 awareness of the airport's geographic location or of the area's ties to notable or accomplished
28 individuals." While this may be true, it is not the only, or even most important, role that airport

1 names play. Our airport's name, SAN FRANCISCO INTERNATIONAL AIRPORT, is a brand.
2 Like any other brand, it embodies the goodwill that consumers associate with the services that we
3 provide.

4 12. I have also reviewed the declarations of Jennifer Birdie and Piotr Rolek. In their
5 declarations they describe how searches for destinations on the websites for Southwest Airlines and
6 Spirit Airlines do not display the full legal names of airports. For example, on the Southwest
7 website, a search returns both the Oakland airport and SFO under the heading "San Francisco Area
8 Airports," while a search on Spirit, which does not have any routes at SFO, returns only "Oakland,
9 CA / San Francisco, CA AREA." The Port suggest that because location is displayed on these
10 websites, rather than the airport name, that this lessens the risk of travelers being confused about
11 the relationship between the Oakland and San Francisco airports. Based on my years of experience
12 in marketing within the industry, and in particular with respect to airport marketing, I strongly
13 disagree. Because the airport names are not displayed on these websites, it is all the more
14 significant how airport names are displayed to travelers in other contexts. Moreover, airport names
15 often correspond to city names, and typically an airport named after a city is owned and operated
16 by that city. That is the case for SFO and, previously, the Port, but also for the airports in Chicago,
17 New York, Dallas, and so on.

18 13. With the foregoing in mind, the search results on the Southwest and Spirit websites,
19 both of which feature references to "San Francisco," may only reinforce that there is a connection
20 between SFO and the Oakland airport that does not exist. This is particularly true for the many
21 travelers unfamiliar with the region's different airports, their locations, and the distinct sources of
22 their operations.

23
24 Executed on this 22nd day of October, 2024 at San Francisco, California.

25
26 

27 Charles Schuler
28

EXHIBIT A

OUTBOUND ADVERTISING – KQED

Support for KQED comes from San Francisco Bay Oakland International Airport offering 47 destinations across the USA, Hawaii and Mexico. Iflyoak.com



KQED-FM (Radio) at 10/15/2024 11:30:02 AM

Add to Report ☐

Tuesday, October 15, 2024

KQED-FM (Radio)

San Francisco, CA

11:33:21 AM that about 500 store closures will happen in its current fiscal year and should immediately help adjusted earnings and free up the cash flow. You're listening to here and now. Support for Kikid comes from San Francisco Bay **Oakland International Airport**, offering service to 47 destinations across the USA, Hawaii and Mexico. I flyoak.Comxfinity mobile customers can connect to wi-fi speeds up to a gig in millions of locations nationwide restrictions apply Xfinity Internet required actual wi-fi speeds vary, not



KQED-FM (Radio) at 10/14/2024 11:30:01 PM

Add to Report ☐

Monday, October 14, 2024

KQED-FM (Radio)

San Francisco, CA

11:30:01 PM San Francisco Bay, **Oakland International airport**, offering service to 47 destinations across the usa hawaii and mexico i fly a.com It's 11 30 hello with newscast from the bbc world service with victoria wounda and roba israel's ongoing offensive in northern gaza is threatening the tens of thousands of people living there in chad weeks of heavy rain have caused extensive flooding with more than 5 500 people dead senegal has a five year economic plan to deliver what they called a diversified and resilient economy but first this news with the bbc

INBOUND ADVERTISING – NPR’s Snap Judgement



WDDE 91.1 FM (Radio) at 10/14/2024 8:05:03 PM

Monday, October 14, 2024
WDDE 91.1 FM (Radio)
Philadelphia, PA

8:07:03 PM Mrs Kathleen Carlson, who adopted snap judgment. Do you have a favorite program you'd like to adopt? Call us at 3000 200,702 12 or visit Delaware public org support for snap judgment comes from San Francisco Bay, **Oakland International Airport**, offering service to 47 destinations across the USA, Hawaii and Mexico. I fly A.COM. this show is supported by progressive insurance looking for a career you'll love with flexibility great pay and benefits and one of the country's top workplaces come join our

Add to Report ☐



90.7 WMFE at 10/14/2024 7:05:03 PM

Monday, October 14, 2024
90.7 WMFE
Orlando, FL

7:06:59 PM solution for businesses of all sizes to attract interview and hire candidates all from one platform. Learn more at indeed.com /NPR. Support for snap judgment comes from San Francisco Bay, **Oakland International Airport**, offering service to 47 destinations across the U, Sa, Hawaii, in Mexico, I fly a.com. this show is supported by progressive insurance looking for a career you'll love with flexibility great pay and benefits and one of the country's top workplaces come join our growing team go to progressive coom

Add to Report ☐



National Public Radio at 10/13/2024 9:05:02 PM

Sunday, October 13, 2024
National Public Radio
U.S. Cable

9:07:12 PM private corporation funded by the American people, and the John s and James I. Knight Foundation helping NPR advance journalistic excellence in the digital age. Support for snap judgment comes from San Francisco Bay **Oakland International airport**, offering service to 47 destinations across the USA, Hawaii and Mexico. I fly oak com. This show is supported by progressive insurance, looking for a career you'll love with flexibility, great pay and benefits, and one of the country's top workplaces come join our growing

Add to Report ☐



KPCC-FM (Radio) at 10/13/2024 5:05:02 PM

Sunday, October 13, 2024
KPCC-FM (Radio)
Los Angeles, CA

5:06:34 PM Other contributors include the Walton family Foundation, working to create access to opportunity for people and communities by tackling tough social and environmental problems. More information is at Walton family Foundation Dot Org. Support for snap judgment comes from San Francisco Bay **Oakland International Airport**, offering service to 47 destinations across the U. Sa, Hawaii, in Mexico, I fly. A.com. This show is supported by progressive insurance looking for a career you'll love with flexibility, great pay and benefits, and one of the country's top

Add to Report ☐



KJZZ 91.5 at 10/13/2024 5:05:02 PM

Sunday, October 13, 2024
KJZZ 91.5
Phoenix, AZ

5:06:14 PM KJZZ. Support for snap judgment comes from San Francisco Bay **Oakland International airport**, offering service to 47 destinations across the USA, Hawaii and Mexico. I fly ok com. This show is supported by progressive insurance looking for a career you'll love with flexibility, great pay and benefits, and one of the country's top workplaces come join our growing team, go to progressive COOM, /careers and apply online today snap studio. So I'm just walking down the street minding my own business, bright, sunny day. I feel something hit me

Add to Report ☐



WVXU at 10/13/2024 5:05:03 PM

Add to Report ☐

Sunday, October 13, 2024
WVXU
Cincinnati, OH

5:07:10 PM for NPR comes from NPR stations. Other contributors include Corporation for public Broadcasting, a private corporation funded by the American people, and the John S. and James L. Knight Foundation helping NPR advance journalistic excellence in the digital age. Support for snap judgment comes from San Francisco Bay [Oakland International Airport](#), offering service to 47 destinations across the USA, Hawaii in Mexico I fly a.com. this show is supported by progressive insurance looking for a career you'll love with flexibility



KUOW-FM (Radio) at 10/13/2024 2:05:02 PM

Add to Report ☐

Sunday, October 13, 2024
KUOW-FM (Radio)
Seattle, WA

2:06:24 PM judgment comes from San Francisco Bay, [Oakland International Airport](#), offering service to 47 destinations across the USA, Hawaii and Mexico. I fly ok.com. This show is supported by progressive insurance looking for a career you'll love with flexibility, great pay and benefits, and one of the country's top workplaces come join our growing team, go to progressive do.com/slash careers and apply online. Today snaps the I'm just walking down the street minding my own business, bright, sunny day. Then I feel something hit me on



Capital Public Radio at 10/13/2024 1:06:00 PM

Add to Report ☐

Sunday, October 13, 2024
Capital Public Radio
Sacramento, CA

1:07:17 PM from San Francisco Bay [Oakland International Airport](#), offering service to 47 destinations across the USA, Hawaii and Mexico. I fly a.com. this show is supported by progressive insurance looking for a career you'll love with flexibility great pay and benefits and one of the country's top workplaces come join our growing team go to progressive do.com/slash careers and apply online today snap studio so i'm just walking down the street minding my own business bright sunny day and i feel something hit me on the back of a head

COOLEY LLP
BOBBY GHAJAR (198719)
JOHN HEMANN (165823)
JUDD D. LAUTER (290945)
3 Embarcadero, 20th Floor
San Francisco, CA 94111-4004
Telephone: (650) 843-5000
Email: bghajar@cooley.com
jhemann@cooley.com
jlauter@cooley.com

DAVID CHIU (189542)
City Attorney
JESSE SMITH (122517)
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CHRISTOPHER STUART (262399)
Deputy City Attorneys
City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4700
Facsimile: (415) 554-4757
Email: Cityattorney@sfcityatty.org
Jesse.Smith@sfcityatty.org
Yvonne.Mere@sfcityatty.org
Julie.Veit@sfcityatty.org
Christopher.Stuart@sfcityatty.org

Attorneys for Plaintiff
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

CITY OF OAKLAND AND PORT OF
OAKLAND,

Defendants.

AND RELATED COUNTERCLAIM

Case No. 3:24-cv-02311-TSH

**REPLY BRIEF IN SUPPORT OF
PLAINTIFF CITY AND COUNTY OF
SAN FRANCISCO'S MOTION FOR
PRELIMINARY INJUNCTION
ENJOINING DEFENDANTS**

Hearing Date: November 7, 2024
Time: 10:00 AM
Courtroom: E – 15th Floor
Trial Date: (None Set)

REPLY BRIEF ISO PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION
Case No. 3:24-cv-02311-TSH

ER-0206

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1 **I. INTRODUCTION**

2 The Port of Oakland wants to make this case about its supposed “need” to convey to the
3 world that its airport is located on the San Francisco Bay. Oakland has many ways to inform
4 travelers that its airport is proximate to San Francisco or the Bay. It didn’t *need* to adopt a new
5 brand that mimics the City’s incontestable SF Mark. Nonetheless, over the objections from the
6 City, the public, the airline and travel industry, and others, that is the path it chose.

7 Oakland’s response tries to distract from established facts by contorting the law and
8 presenting a narrow, inaccurate, and misleading narrative. In particular, it improperly collapses the
9 likelihood of confusion analysis into an assessment of how consumers purchase airfare on the
10 websites of its two closest airline partners, Spirit and Southwest – both of which may have played
11 a role in Oakland’s adoption of the Infringing Mark *but have not yet used it*. A fulsome examination
12 of the marketplace and all relevant factors, however, overwhelmingly favors an injunction.

13 Oakland’s analysis of **similarity of marks** is not credible—sidestepping black-letter law
14 that similarities must be weighed more heavily than differences while ignoring that the Infringing
15 Mark subsumes and frontloads the City’s name, is often unaccompanied by an IATA code or logo,
16 and, when spoken, sounds alike. Oakland is dismissive of the undisputed fact that the parties offer
17 **identical services** – a pivotal factor in the analysis that lessens the City’s burden on the similarity
18 of marks factor – and does the same with the **direct overlap in marketing channels** (OTAs,
19 airlines, travel agencies, social media, travel and navigation apps, radio, national publications).

20 Oakland’s response to the City’s **evidence of strength** is a made-up legal theory that
21 advertising, accolades, and unsolicited media attention don’t count if they *also* display “SFO” or a
22 logo, or merely refer to the City’s mark in discussing SFO. It cites no supporting decision, let alone
23 one finding that a 7-decade old mark with a fraction of SFO’s publicity and revenue is not strong.

24 To top it off, Oakland criticizes the City’s survey showing over 20% net confusion while
25 neglecting to conduct its own and asks the Court to ignore evidence **of actual confusion**. Although
26 the City needs none to prevail, this evidence is highly probative and, at this juncture, admissible.
27 Predictably, travelers have purchased tickets for flights to and arrived at the wrong airport and
28 continue to do so. Second Declaration of Chris Birch (“Birch II”) ¶ 3. Oakland doesn’t care about

1 international travelers, non-native English speakers, and those from parts of the country who are
2 unaware that the Infringing Mark does not identify *the City's* airport. The City does.¹

3 The City has more than a “fair chance of success” on the merits. Moreover, Oakland faces
4 no “**hardship**” to revert to the registered trademark it has used for decades, especially as its
5 Opposition confirms that the mark’s rollout is far from complete. And the City will suffer
6 **irreparable injury** if a rival airport is using a copycat name – the only other airport in the country
7 doing so – and threatening its goodwill and reputation, and control over its incontestable trademark.

8 The Court is urged to stop Oakland from using the Infringing Mark.

9 **II. THE CITY ESTABLISHED THAT IT IS LIKELY TO SUCCEED ON THE MERITS**

10 **A. Oakland Does Not Dispute the Validity and Priority of the SF Mark.**

11 The City established (Mot. 11–12), and Oakland effectively concedes, the validity of the SF
12 Mark. The City’s incontestable registration is conclusive proof that the mark is valid *and* has
13 secondary meaning (an admission that is also relevant to the strength of mark factor). *Id.*

14 **B. The City Established that all *Sleekcraft* Factors Weigh in Its Favor.**

15 The City properly applied all of the Ninth Circuit’s *Sleekcraft* factors – consistent with how
16 courts have done in the myriad cases cited in its motion (Mot. 13–14, 22–23) and not in a “rigid”
17 and mechanistic manner. Opp. 6. Oakland’s response compresses the likelihood of confusion
18 analysis into an evaluation of “context” (circularly defined as “what a reasonable consumer would
19 believe based upon what they see on the screen”) and its narrow view of “consumer sophistication.”
20 By focusing on this *subset* of two factors, Oakland glaringly ignores or downplays many
21 unfavorable facts and factors. Oakland also construes “confusion” too narrowly to mean only
22 confusion about whether the Oakland airport *is* the San Francisco airport. But cognizable confusion
23 includes both **initial interest confusion** (where a defendant’s mark creates initial customer interest
24 even if no actual sale occurs as a result (*see Brookfield Communications, Inc. v. West Coast*
25 *Entertainment Corp.*, 174 F.3d 1036, 1063–64 (9th Cir. 1999)), and **confusion as to affiliation or**

26
27 ¹ The City has amassed this preliminary record without Oakland’s candor about confusion at
28 Oakland’s airport: Oakland *refuses* to meaningfully oblige the City’s public records requests. Yakel
Decl. ¶ 21. The record demonstrates that Oakland knew of the City’s trademark, mimicked it, and
ignored warning signs occurring at a frequency uncommon in a typical trademark case. Mot. 6.

1 **sponsorship.** See *Int’l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC*, 823 F.3d
2 153, 161–62 (2d Cir. 2016) (error to consider only confusion as to source, and not confusion as to
3 sponsorship, affiliation or connection). All such confusion is relevant here but ignored by Oakland.

4 **1. The Parties’ Marks Are Highly Similar.**

5 Under the applicable legal test, Oakland cannot credibly dispute that the parties’ marks are
6 similar. Mot. 15-17. Both begin with “SAN FRANCISCO” and end with “INTERNATIONAL
7 AIRPORT”. Indeed, the Infringing Mark incorporates *every word* of the City’s mark:

8 **SAN FRANCISCO INTERNATIONAL AIRPORT**

9 **SAN FRANCISCO BAY OAKLAND INTERNATIONAL AIRPORT**

10 The result is that the marks look alike, are pronounced alike, and share similar meanings; all the
11 more so when they are truncated. Mot. 8. SAN FRANCISCO is both the first element of the marks
12 read by consumers and the dominant one.² See *In re Detroit Athletic Co.*, 903 F.3d 1297, 1303
13 (Fed. Cir. 2018). The Infringing Mark’s prominent use of SAN FRANCISCO is “particularly
14 significant because consumers typically notice [the initial two words of a mark] first,” (*id.*) and also
15 because of the role that city names traditionally play within airport names as indicators of both the
16 airport’s operator along with the location of the airport. Second Decl. of Charles Schuler (“Schuler
17 II”) ¶ 12; Andretta Decl. ¶ 24. The City has enjoyed exclusive use of “SAN FRANCISCO” for
18 airport services for over 70 years.³ See *N. Am. Aircoach Sys., Inc. v. N. Am. Aviation, Inc.*, 231 F.2d
19 205, 210 (9th Cir. 1955). This makes Oakland’s replication of the SF Mark even more confusing.

20 Oakland responds by overemphasizing the significance of the word “Bay” in its Infringing
21 Mark. This is just another way of saying that the parties’ marks are not *identical*, but that is not the
22 test. The descriptive word “Bay” does not diminish irrefutable similarities. *E.g.*, *Williams II* ¶ 8.

23 Oakland fares no better distinguishing the City’s authorities. It suggests that *Greater*
24 *Orlando Aviation Auth. v. Sanford Airport Auth.* is unpersuasive because it concerned two airports

25 ² Further reinforcing this point, the parties were both required by the USPTO to disclaim rights in
26 “INTERNATIONAL AIRPORT” due to its descriptiveness and common use by others, but not
27 “OAKLAND” or “SAN FRANCISCO.” Second Declaration of Jessica Williams (“Williams II”) ¶¶ 2-3. This indicates the USPTO regards city names as the dominant component of these marks.

28 ³ Oakland suggests that there are “thousands” of federally registered trademarks that “start with
‘San Francisco’” (Opp. 15) but cites no evidence. In any case, the relevant services are airports
and, prior to Oakland’s infringement, only the City had used its name for airport services.

1 using the same city name, whereas Oakland is using “San Francisco Bay,” not “San Francisco.”
2 Opp. 17. This is a distinction without a difference. *Both marks lead with SAN FRANCISCO*. It
3 similarly argues that *Perfumbay.com Inc. v. eBay Inc.* is distinguishable because
4 “PERFUMBAY” incorporated “EBAY,” whereas Oakland merely “replaced... ‘Metropolitan’”
5 with “San Francisco Bay.” Opp. 17. This too is semantics. However Oakland spins its mark, it is
6 no less true that the *entire* SF Mark is subsumed within it – just like in *Perfumbay*. Mot. 17.

7 Meanwhile, the only new case cited by Oakland is factually distinguishable. In *Florida*
8 *Int’l University v. Florida Nat’l University*, the Eleventh Circuit affirmed that “Florida National
9 University” and “Florida International University” were dissimilar largely because the parties were
10 “in a field where so many competitors have names that appear and sound similar.” 830 F.3d 1242,
11 1261 (11th Cir. 2016). Against a backdrop of many similar university names across the U.S., minor
12 differences between the parties’ marks took on greater importance. Also, the marks were being
13 marketed to students and parents whom “generally spend a substantial amount of time and energy
14 learning about their options” before committing their educational future *and tens of thousands of*
15 *dollars* to a school. *Id.* Here, there was only *one* airport in the United States with “SAN
16 FRANCISCO” in its name prior to Oakland’s infringement, and the degree of care exercised in
17 purchasing airfare is incomparable to a decision to attend a four-year college.

18 Oakland’s brief suggests that examining the parties’ marks in “context” is a separate factor
19 (Opp. 7-8), but it is part of the “similarity of marks” factor, which instructs that “marks must be
20 considered in their entirety and as they appear in the marketplace.” *GoTo.com, Inc. v. Walt Disney*
21 *Co.*, 202 F.3d 1199, 1205–06 (9th Cir. 2000). Under the pretense of setting the record straight
22 regarding “the commercial context in which consumers actually search for and purchase flights,”
23 Oakland and its declarants conjecture that a combination of “IATA codes, city references or other
24 pertinent information” displayed on airline and OTA websites clearly “distinguish[] airport
25 choices.” Opp. 8. This conclusion is based on an incomplete and misleading picture of the market.

26 To begin, Oakland’s emphasis on the websites for Southwest and Spirit Airlines to the
27 exclusion of other market contexts is backwards. Neither website currently displays the Infringing
28 Mark – demonstrating that Oakland’s top airline partners are smart enough not to use the mark, or

1 simply don't "need" it. Moreover, most travelers today rely on OTAs as a resource when
2 purchasing airfare; and many of the most popular OTAs display the Infringing Mark in full. Schuler
3 II ¶¶ 8. This means that by the time these consumers arrive at an airline website, they will have
4 already encountered the Infringing Mark, to say nothing of other contexts in which the Infringing
5 Mark would have been displayed to them.

6 Travelers also become familiar with airport names prior to making purchases by
7 encountering them in advertising and other media such as news articles, and this background can
8 inform later purchasing decisions. *Id.* ¶ 9. In these contexts or aurally, logos or IATA codes often
9 are **not** conveyed at all. *See id.* ¶¶ 9-10; Williams Decl. ¶¶ 14-15; Second Decl. of Melissa Andretta
10 ("Andretta II") ¶¶ 7-10. *See Allstate Ins. Co. v. Kia Motors Am., Inc.*, 2017 U.S. Dist. LEXIS
11 211399, at *31-32 (C.D. Cal. 2017) (marks similar despite distinguishing logo because, among
12 other reasons, defendant has no "control over the way in which its dealers describe" its product);
13 *Boldface Licensing+Branding v. By Lee Tillett, Inc.*, 940 F. Supp. 2d 1178, 1187 (C.D. Cal. 2013)
14 (KROMA and KHROMA BEAUTY BY KOURTNEY, KIM AND KHLOE similar because
15 KHROMA was often displayed, by itself, by third parties). Of note, these conclusions are not
16 inconsistent with Oakland's Bridie, Rolek, and Reim declarations.⁴

17 Likewise, Oakland's reliance on its IATA code as distinguishing the parties' marks is
18 misplaced. Opp. 17. It presumes – without any evidence – that consumers (including out-of-state
19 or international travelers) recognize the "OAK" IATA code and know that the corresponding
20 airport (i) is not the San Francisco International Airport, and (ii) is not otherwise associated with
21 the City or its airport. Also, as the City explained, in many contexts the IATA code is displayed
22 only after an airport's name, where it is less likely to be seen or make a commercial impression.
23 Mot. 17. More generally, even where IATA codes have visible placement, the parties' word marks
24 remain overwhelmingly dominant. *See, e.g., Rearden LLC v. Rearden Com., Inc.*, 683 F.3d 1190,

25
26 ⁴ Oakland proffers these declarations as dispassionate, objective opinions about the parties' market.
27 But each of the declarants is a self-interested player, Andretta II ¶ 4, and may have been involved
28 in Oakland's decision to adopt the Infringing Mark. Moreover, although Dr. Reim is implicitly
positioned as an aviation marketing "expert," she is not so qualified. Fed. R. Evid. 702. She
describes her focus as "service network strategies and route development," not consumer marketing
or behavior, which is what is at issue here. Schuler II ¶ 6. Her opinions are not probative at all.

1 1212 (9th Cir. 2012) (surname “Rearden” was prominent in both marks despite distinct logos);
2 *Charles Schwab & Co. v. Hibernia Bank*, 665 F. Supp. 800, 808–09 (N.D. Cal. 1987) (house
3 mark insufficient to distinguish infringing sub-brand because it was downplayed in ads while the
4 infringing mark was in bold). Oakland offers no evidence or argument to the contrary.

5 Oakland also suggests that city and region references on some airfare booking websites
6 mitigate confusion risk. Opp. 7–8. In the present context, however, they exacerbate it. Mot. 21.
7 A search for either party’s airport on Southwest’s website returns them both under the heading “San
8 Francisco Area Airports,” while Spirit’s returns “Oakland, CA / San Francisco, CA AREA.” Bridie
9 ¶ 11; Rolek ¶ 17. For a consumer visiting these sites already having formed an impression of the
10 Infringing Mark, these results (both which prominently feature references to “San Francisco”) may
11 reinforce that the Oakland airport is SFO or affiliated with SFO. Schuler II ¶ 12.

12 **Finally**, Oakland relegates to its declarations an argument that it is “common” for more
13 than one airport within a region to share a city name, and thus, travelers might distinguish between
14 them. Reim ¶¶ 17, 19; Bridie ¶ 6; Rolek ¶ 6. None of its evidence reflects actual consumer
15 perception. Regardless, this argument is undermined by the facts. For example, O’Hare and
16 Midway are both operated by the City of Chicago; Fort Worth and Love Field are both operated, in
17 whole or in part, by the City of Dallas; and Dulles Airport and Ronald Reagan National are both
18 operated by the federal government. Andretta ¶ 24. That is, the **source of these airports is the**
19 **same**. Thus, confusion is heightened when two regional airports operated by different cities share
20 the same city name because that is **not** the norm. Mot. 15–16 (discussing Orlando airports).

21 2. The City’s Mark Is Unquestionably Strong

22 Oakland fails to cite any case approximating a decades-old incontestable mark, supported
23 by tens of millions in advertising, billions in revenue, and hundreds of millions of commercial
24 impressions, in which a court did not conclude that a brand owner’s mark was strong. Instead,
25 Oakland introduces a strawman, misconstruing the Motion as arguing that the SF Mark is inherently
26 distinctive. The City made no such argument. Instead, the City established that the SF Mark is
27 strong by virtue of its significant *commercial* strength, secondary meaning (undisputed, *see* § II.A),
28 and longstanding use. Mot. 12–14. Oakland also badly misconstrues the authorities cited in the

1 Motion. It argues that both *Coachella Music* and *North American Aircoach* concerned inherently
2 distinctive trademarks that the courts found strong due to their conceptual strength. Opp. 18–19.
3 This is the ***opposite*** of what those cases say. See *N. Am. Aircoach*, 231 F.2d at 209–10 (explaining
4 that geographic names may “acquire a secondary or fanciful meaning” and become “strong,” and
5 affirming that “‘North American’ in connection with aviation means the plaintiff solely and
6 exclusively” due to commercial success and exclusive use); *Coachella Music Festival, LLC v.*
7 *Simms*, 2018 WL 6074556, at *4 (C.D. Cal. Sept. 10, 2018) (explaining that a “geographic location”
8 like Coachella “is generally a descriptive mark” but acquired secondary meaning and strength due
9 to substantial success, including \$84M in sales).

10 The record concerning the strength of the SF Mark is even stronger than in those cases.
11 SFO is an award-winning and highly acclaimed airport that receives tens of millions of passengers
12 each year, all of whom encounter the SF Mark in some fashion. Mot. 2-4; Schuler ¶¶ 8–9, 11–16.
13 The SF Mark is also the subject of millions of dollars in advertising (*id.* ¶ 12), is displayed in a
14 variety of commercial contexts (*id.* ¶¶ 14–16), and extensive unsolicited media attention (Williams
15 ¶¶ 3–5). The SF Mark is undoubtedly widely recognized and, by one independent measure,
16 regularly ranks among the top 25 strongest airport brands. Schuler ¶ 17.

17 Oakland responds to this evidence by arguing that the City’s advertising shouldn’t factor
18 into the SF Mark’s strength because the City cannot isolate its spend on advertising that *only*
19 displays the SF Mark. This nonsensical argument is unsupported by any legal authority. Marketing
20 spend and accolades are proxies for consumer awareness of a mark. So long as a mark is displayed
21 in advertising materials (e.g., Schuler ¶¶ 14–16), it contributes to that awareness, regardless of
22 whether other branding indicia (e.g., logos, taglines, etc.) are present. See *Vans, Inc. v. Walmart,*
23 *Inc.*, 2022 WL 1601530, at *9 (C.D. Cal. Mar. 31, 2022) (granting injunction and finding strength
24 of trade dress weighed strongly in plaintiff’s favor, noting its “tens of millions of dollars” on
25 advertising, notwithstanding defendant’s criticism that ads were not specific to the trade dress);
26 *WEX Inc. v. HP Inc.*, 2024 WL 3358651, at *29-30 (D. Me. July 9, 2024) (trademark strong due to
27 35 years of exclusive use and significant advertising spend).

28 Oakland also argues that references to the SF Mark in media publications are “rarely” in

1 isolation and generally refer to the airport as a location. Opp. 19. Because media attention is a
2 proxy for consumer awareness, courts routinely recognize that significant unsolicited media
3 attention is strong evidence of commercial strength; there is no separate requirement for a mark to
4 be displayed in a particular way so long as it appears. *See, e.g., Blue Bottle Coffee, LLC v. Liao*,
5 2024 WL 2061259, at *11-12 (N.D. Cal. May 7, 2024) (mark was strong because of, among other
6 things, it “received news and social media coverage”); *Reflex Media, Inc. v. Chan*, 2021 WL
7 5936912, at *6 (C.D. Cal. June 4, 2021) (brand with “millions of customers” and significant media
8 recognition regarded as strong) (collecting cases). The SF Mark is **strong**. *See* Mot. 12–14.

9 **3. Identical Services (Airports) Make Confusion Likely**

10 Oakland does not dispute that the parties are competitors and offer the same service. Mot.
11 14-15. Nor does it challenge caselaw directing that where services are identical, lesser showings
12 of similarity are required. *Id.* Instead, it seeks to minimize this by asking the Court to consider the
13 parties’ competitive posture only in combination with other factors. Opp. 20. Consistent with the
14 law, the City welcomes the Court to do so. Oakland cannot wave away that the parties sell the
15 same services to the same customers, via the same marketing and sales channels. The parties’
16 overlapping services weigh heavily in the City’s favor.

17 **4. Overlapping Marketing Channels Make Confusion Likely**

18 Oakland also does not dispute that the parties share the same marketing channels. Instead,
19 misapplying two decisions, Oakland argues that shared use of the internet for marketing is not
20 probative of confusion. Opp. 20. Here, however, the parties’ airports are profiled in the *same*
21 publications, third-party websites, and apps, and on the same local radio station. *See* Schuler II ¶
22 10. This isn’t a case in which the parties both merely “have websites.” This convergence of
23 marketing channels further heightens the risk of confusion and weighs heavily in the City’s favor.

24 **5. Oakland’s “Purchasing Care” Argument Does Not Change the Analysis**

25 Oakland attributes a heightened standard of care to air travelers, but this is unsupported by
26 the record and law. The sophistication and depth of experience of air travelers varies widely and
27 includes both inexperienced and knowledgeable consumers. Mot. 20–21; Andretta ¶ 19. And while
28 travel is often planned carefully in advance, it is also often the result of spur of the moment decision

1 making. *Id.* The law is clear that considerations of consumer care must account for the experiences
2 of all travelers. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149, 156 (9th Cir.
3 1963); *Brookfield*, 174 F.3d at 1060. *See also Ford Motor Co. v. Summit Motor Prods., Inc.*, 930
4 F.2d 277, 293 (3d Cir. 1991) (“when a buyer class is mixed, the standard of care ... will be equal
5 to that of the least sophisticated consumer in the class”). Here, the victims of Oakland’s
6 infringement could just as easily include foreign travelers or those who buy a \$49 one-way ticket;
7 book a \$30 Uber ride; arrange for a car rental or car share; get a ride from a friend; or hastily book
8 a flight on an app. The record demonstrates the ease with which the consuming public has been
9 confused at this early stage (Mot. 17–18) and does not support any inference that victims’ “degree
10 of care” would prevent confusion. Mot. 20–21. That is likely why many airlines and agencies voiced
11 concerns over the name change. *Id.* 6. “[G]iven the similarity of the parties’ marks and relatedness
12 of the goods on which those marks appear, even purchasers exercising a high degree of care would
13 likely be confused, and some, in fact, have been confused.” *Boldface*, 940 F. Supp. 2d at 1194.

14 Oakland’s various authorities do not alter this conclusion. Opp. 9. It relies on one case,
15 which stands for the unremarkable observation that “there are many contexts in which it no longer
16 holds true” that internet shoppers are presumed to be unsophisticated. *Id.* All of its cited cases are
17 inapt or distinguishable.⁵ Mot. 20–21. This factor weighs in favor of confusion – not against it.

18 6. The City’s Evidence of Actual Confusion Is Probative

19 Actual confusion is difficult to adduce. “Persons who are truly confused will often never
20 be aware of the deception. Others who were confused and later learned of their deception will often
21 not bother to report the fact.” 3 McCarthy on Trademarks and Unfair Competition § 23:12 (5th ed.
22 2024). The law requires a **likelihood** of confusion, *Perfumbay.com Inc. v. eBay Inc.*, 506 F.3d
23 1165, 1176 (9th Cir. 2007). The City doesn’t need any actual confusion evidence. Mot. 17–18.

24
25 ⁵ *Schluter Systems, L.P. v. Telos Acquisition Co. 10, LLC*, concerned online shoppers “who
26 specialize in tile construction,” *i.e.*, expert consumers. 2024 WL 1659898, at *11 (N.D. Cal. 2024).
27 *BNSF Ry. Co. v. Float Alaska IP, LLC*, indicated that, in selecting services from a freight railway
28 and start-up airline, consumers are discerning of “quality of service and safety,” but nevertheless
granted a preliminary injunction. 2023 WL 6783506, at *7, *11 (C.D. Cal. 2023). And *New Flyer
Industries Canada ULC v. Rugby Aviation, LLC*, concerned a small airline that primarily served a
30-mile radius, and which required tickets to be purchased by phone. 405 F. Supp. 3d 886, 894
(W.D. Wash. 2019). None of these decisions address the variable pricing and levels of care here.

1 Here, confused travelers, recognizing that they’ve purchased tickets to the wrong airport are
2 likely to be in transit (and rushed to get to the right airport). They are unlikely to have a desire or
3 time to report their confusion as they adjust their plans, and unlikely to communicate their
4 confusion to airport personnel (as opposed to airlines) because the airport has little ability to help
5 them. Other travelers who instead incorrectly assume that Oakland’s airport is the same as or
6 affiliated with SFO or the City are unlikely to register their mistaken view at all.

7 Thus, it is significant that the City already has meaningful evidence of ongoing confusion.
8 **Oakland’s response is to belittle it.** Multiple individuals have booked flights to one party’s airport
9 intending to travel to the other (Williams Exs. T-V; Williams II ¶¶ 4-15; Birch ¶¶ 6–7, Ex. A),
10 including several known instances since the Motion was filed (Birch II ¶ 3). Evidence also includes
11 travelers tagging the wrong airport on social media, and those directed to the wrong airport by
12 digital assistants, navigation apps, and rideshare services, (Williams Exs. O, V–W; Williams II ¶¶
13 4-15), and even airline professionals taking a meeting with the Oakland airport thinking it was SFO.
14 Andretta II ¶ 11. These examples of confusion are entitled to weight, and even “non-consumer
15 confusion can properly factor into the ‘likelihood of confusion’ inquiry,” both as a proxy for
16 consumer confusion and a contributor to it. *Rearden*, 683 F.3d at 1214–15; *see also Ironhawk*
17 *Techs., Inc. v. Dropbox, Inc.*, 2 F.4th 1150, 1165–66 (9th Cir. 2021) (error to disregard declaration
18 of plaintiff’s CEO that he was asked about the affiliation between the parties). This is especially
19 true at the preliminary injunction stage. *See* Mot. 18 (collecting cases); *Vans*, 2022 WL 1601530,
20 at *11-12 (crediting, in part, three instances of online confusion).

21 Part of Oakland’s attack is to argue that the evidence is inadmissible hearsay. Opp. 11.⁶
22 But “the rules of evidence do not apply strictly to preliminary injunction proceedings” and
23

24 ⁶ Oakland’s decisions on this issue are inapposite, including because they resulted from motions *in*
25 *limine* following discovery or after a bench trial. *See, e.g., Great W. Air, LLC v. Cirrus Design*
26 *Corp.*, 649 F. Supp. 3d 965, 982 (D. Nev. 2023) (affirming finding at trial that evidence was limited
27 relative to parties’ 13 years of coexistence); *Idaho Golf Partners, Inc. v. Timberstone Mgmt., LLC*,
28 2016 WL 4974944, at *3 (D. Idaho Sept. 16, 2016) (motion *in limine*); *Trouble v. Wet Seal, Inc.*,
179 F. Supp. 2d 291, 300 (S.D.N.Y. 2001) (similar). Only *Nordstrom, Inc. v. NoMoreRack Retail*
Group, Inc. was decided on a motion for preliminary injunction, and it is distinguishable: over two
years, there were a handful of examples of confusion comprised mostly of misdirected
communications. 2013 WL 1196948, at *6-7 (W.D. Wash. Mar. 25, 2013). Here, Oakland has been
using the Infringing Mark for a few months and traveler confusion is not a few errant emails.

prohibitions on hearsay are relaxed. *Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013). Courts regularly credit actual confusion evidence like the City’s at this stage. *Vans*, 2022 WL 1601530, at *11. Notably, in *Kiva Health Brands LLC v. Kiva Brands Inc.* (cited by Oakland), this Court held that a confusion log like the City’s “is not hearsay” because it falls within the state of mind exception. 402 F. Supp. 3d 877, 895 (N.D. Cal. 2019) (collecting cases). The log was even given weight notwithstanding that the plaintiff had conspicuously failed to “record any of the phone calls reflected in the log, it deleted all of the voicemails, and it did not retain any of the underlying emails.” *Id.* No such indicia of unreliability are present here. To the contrary, when the City became aware of confusion, it began recording information from willing travelers. Birch ¶ 5. The City’s evidence of ongoing confusion—in different forms and forums—is “strong” evidence of a likelihood of confusion. Mot. 10.

7. The City’s Survey Is Well-Designed and Confirms Confusion Is Likely

Courts routinely recognize, and Oakland does not dispute, that surveys showing net confusion rates above 15% are strong evidence of confusion. Mot. 19 (collecting cases crediting surveys with 12.5+% confusion rates). Accordingly, the Butler survey, which returned a net confusion rate above 20%, is highly probative. *Vans*, 2022 WL 1601530, at *11 (granting injunction in part on survey showing 23.2% net confusion); *WEX*, 2024 WL 3358651, at *26-27 (granting preliminary injunction in part on survey by Sarah Butler showing 20.8% confusion).

Without doing its own survey – despite having the time and financial ability to do so (*id.* (noting lack of rebuttal survey)) – Oakland hired Dr. Scott to critique Butler’s survey. Her criticisms fall short and “do not remedy the lack of affirmative evidence to the contrary.” *Pres. & Trs. Colby Coll. v. Colby Coll.-N.H.*, 508 F.2d 804, 809–10 (1st Cir. 1975) (reversing denial of injunction where defendant criticized survey without offering its own).

First, Dr. Scott claims that Butler’s survey universe was selective and underinclusive, because it purportedly “excludes markets that currently account for the largest number of Oakland passengers.” Scott ¶ 8(i). But this criticism implies that the only relevant consumers are in the Oakland airport’s current market. Butler II ¶¶ 4, 9-20. Given that the stated purpose of the name change is to help grow the airport and expand its footprint, it was also important for the survey to

1 account for “areas where Oakland International Airport itself has suggested its name change may
2 have an impact.” *Id.* ¶ 10 and fn30. Moreover, it was appropriate for the survey not to target local
3 geographic regions in which respondents were more likely to be familiar with the parties’ dispute
4 to avoid biasing results. *Id.* ¶ 15 and §IV.A. As Ms. Butler explains, “Dr. Scott presents no data to
5 demonstrate that some other set of states would have yielded different results and ignores [] data
6 demonstrating that even consumers who have previously traveled to Northern California were
7 confused.” *Id.* ¶¶ 4, 15-21. Dr. Scott’s other criticisms of the Butler survey’s universe are equally
8 baseless. *See generally* § IV.A (¶¶ 17-21).

9 **Second**, Dr. Scott contends that the Butler survey failed to replicate real-world marketplace,
10 and objects that Ms. Butler tested confusion at only one point in time. Scott ¶¶ 13–33. These
11 criticisms have no merit: proper methodology required testing whether the name “San Francisco
12 Bay Oakland International Airport when appearing in a realistic manner causes confusion.” Butler
13 II ¶¶ 5, 22-34. The Butler survey did so by showing uses consistent with how the marks have been
14 and could be displayed. *Id.* And any survey is necessarily a snapshot of perceptions at a particular
15 point in time. *Id.* ¶ 24.

16 **Third**, Dr. Scott takes issue with the format of one of Butler’s questions (“which is the
17 primary airport”), but Butler’s results demonstrate a net confusion rate of over 18% *even without*
18 it. *Id.* ¶ 43. Dr. Scott takes other swipes at the Butler survey, which are not called out in the
19 Opposition, but these too are baseless. *Id.* ¶¶ 46-48. Overall, the Butler survey is a powerful
20 indicator of likelihood of confusion, unrebutted by a contrary survey or Dr. Scott’s flimsy and
21 superficial criticisms. *Id.* ¶¶ 49-50 (explaining conclusions and Dr. Scott’s failure to consider data).

22 **8. Oakland Ignored Objections and Infringed the SF Mark**

23 Oakland says that it adopted the Infringing Mark with no intent to copy or deceive, but this
24 is belied by the record. Oakland does not dispute that it had actual knowledge of the SF Mark, and
25 that it pressed ahead with the Infringing Mark over objections from the City, multiple airlines,
26 travel agencies, and others. Mot. 7–8, 21–22 (citing evidence). *See Boldface*, 940 F. Supp. 2d at
27 1195. Moreover, Oakland has been less than forthcoming with records requests inquiring about
28 the name change, the City’s trademark rights, and confusion occurring at Oakland. Yakel ¶ 21.

1 The Court may also infer bad faith from Oakland’s decision to rebrand yet forego a trademark
2 application. The logical inference from this is that Oakland knew it may be sued and did not want
3 the USPTO to assess the SF Mark as confusingly similar. On balance, this factor weighs in the
4 City’s favor. Regardless, lack of intent cannot weigh against a likelihood of confusion.

5 **9. Oakland’s Likelihood of Expansion Makes Confusion Likely**

6 As explained (Mot. 22), this factor is “relatively unimportant where two companies already
7 compete to a significant extent.” *Brookfield*, 174 F.3d at 1060. It should nevertheless carry some
8 weight here. Oakland’s stated impetus for adopting the Infringing Mark is to attract more business
9 to its airport. Opp. 4–5. If Oakland succeeds in adding new routes or attracting new airlines, in
10 particular airlines with routes to SFO, this will only increase opportunities for confusion.

11 **C. The Fair Use Doctrine is Inapplicable Here**

12 Oakland disingenuously argues that the doctrine of fair use insulates it from liability for
13 adopting the Infringing Mark. Opp. 21. Fair use is inapplicable here as a matter of law. “The only
14 type of use which can qualify as a ‘classic fair use’ is use [] in a *non-trademark* sense. This is the
15 rule both at common law and under the Lanham Act.” 1 McCarthy on Trademarks and Unfair
16 Competition § 11:46 (5th ed. 2024).⁷ See 15 U.S.C. § 1115(b)(4) (recognizing descriptive fair use
17 as a defense to infringement of an incontestable trademark only where the use is “*otherwise than*
18 *as a mark*” (emphasis added)). This is illustrated in *Humboldt Wholesale, Inc. v. Humboldt Nation*
19 *Distribution, LLC*, where this Court considered on a motion to dismiss whether fair use could apply
20 to the defendants’ use of the geographic descriptor “Humboldt” within a family of marks (e.g.,
21 “Humboldt Nation Distribution,” “Humboldt Nutrients,” etc.). 2011 WL 6119149, at *5 (N.D. Cal.
22 Dec. 8, 2011). The Court concluded that it could **not**, explaining that “[f]air use only allows use of
23 another’s mark where the use is otherwise than as a trade or service mark.” *Id.* (quotations omitted).
24 This was so, even though the defendants were using the term “Humboldt” only “as part of” their
25 own trademarks, *i.e.*, in combination with other words. *Id.*

26 Here, Oakland is using the terms “San Francisco” and “International Airport” as

27 ⁷ For this reason, the Trademark Trial and Appeal Board, which has a purview limited to issues of
28 trademark registrability, will not entertain fair use claims even for components of marks. See
Truescents LLC v. Ride Skin Care Care, L.L.C., 81 U.S.P.Q.2d 1334, at *4 (T.T.A.B. 2006).

1 components of a trademark; indeed, they are using the Infringing Mark as a **replacement** for their
2 registered OAKLAND INTERNATIONAL AIRPORT mark. Mot. 5. And that use is causing
3 confusion. The defense of fair use is therefore unavailable to Oakland, and does not help it here.

4 **D. Oakland Fails to Rebut the City’s Presumption of Irreparable Harm**

5 Oakland agrees that the City is entitled to a presumption of irreparable harm upon a showing
6 of likelihood of success on the merits. Opp. 22. The City has done so. To rebut the presumption,
7 Oakland was required to “introduce evidence sufficient for a reasonable factfinder to conclude that
8 the consumer confusion is unlikely to cause irreparable harm.” *Nichino Am., Inc. v. Valent U.S.A.*
9 *LLC*, 44 F.4th 180, 186 (3d Cir. 2022). It has not. At most, Oakland argues that SFO has continued
10 to thrive and receive positive press despite the ongoing harm caused by the Infringing Mark and
11 risk of future reputational damage. Opp. 22. This argument does not meet its burden.

12 Still, the City detailed the immediate and irreparable harm to its reputation and goodwill.
13 Andretta ¶¶ 8, 27. *See SunEarth, Inc. v. Sun Earth Solar Power Co.*, 846 F. Supp. 2d 1063, 1083
14 (N.D. Cal. 2012). Every disgruntled, confused passenger that ends up at the wrong airport or
15 otherwise has an unsatisfactory experience at the Oakland airport jeopardizes the City’s decades-
16 long effort to cultivate an award winning, world-class reputation around the globe. Schuler ¶¶ 8–9,
17 17; Andretta ¶¶ 8, 27. The City’s harm is not speculative or unfounded, as Oakland argues. *See,*
18 *e.g., Cisco Sys., Inc. v. Shenzhen Usource Tech. Co.*, 2020 WL 5199434, at *8 (N.D. Cal. Aug. 17,
19 2020); *Vans*, 2022 WL 1601530, at *13 (“evidence of loss of market control, consumer confusion
20 [and survey evidence], and the poor quality of [defendant’s] shoes is sufficient to establish” in light
21 of the presumption).

22 **E. The Public Interest Strongly Favors an Injunction**

23 Oakland acknowledges that protecting the public from trademark infringement is in the
24 public interest. Opp. 25. Its only response is that the City has failed to demonstrate a likelihood of
25 success on the merits or irreparable harm. As discussed above, that argument fails.

26 **F. The Balance of Hardships Strongly Favors an Injunction**

27 Oakland cannot complain of alleged harms “when properly forced to desist from its
28 infringing activities.” *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995),

1 superseded on other grounds by 17 U.S.C. § 1117(c). Oakland’s only purported hardship is that it
2 will need to revert to its old name, and may, as a practical matter, be forced to scrap its plans for
3 the Infringing Mark altogether. Opp. 24. **It should.** Oakland was well aware of the City’s concerns
4 before it forged ahead with rebranding, and has no legitimate interest in infringing the SF Mark.
5 *Cf. Cadence Design Sys. v. Avant! Corp.*, 125 F.3d 824, 829 (9th Cir. 1997) (a knowing infringer
6 “cannot complain of the harm” from being forced to stop infringement). While Oakland argues
7 that courts have “routinely” rejected this argument, its authorities are distinguishable.⁸

8 Critically, Oakland provides scant **evidence** of hardship. It argues it will suffer “immediate
9 and direct harm” because it “has invested considerable resources” in the Infringing Mark. Opp. 24.
10 It provides no evidence quantifying its alleged investment or the cost of complying with an
11 injunction and, once more, Oakland’s cited cases (*id.* 24-25) provide no support for its position. It
12 also speculates that, as a practical matter, an injunction might cause it to permanently scrap plans
13 for the Infringing Mark. But the balance of hardships doesn’t favor a defendant merely because it
14 might capitulate if it loses the motion. If that were so, this factor would favor every defendant.

15 Oakland needs to go back to its registered trademark. It offers no argument that doing so
16 would cause it to lose customers. Nor would it impact its main airline partners (Southwest and
17 Spirit), who say they are **not** using the Infringing Mark. Balanced against the actual confusion and
18 the City’s interest in protecting its reputation and goodwill, the equities favor requiring Oakland to
19 revert back to the name that, up until five months ago, it had used for decades.

20 **III. CONCLUSION**

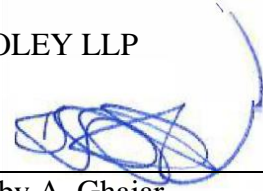
21 For the foregoing reasons, the City respectfully requests that the Court enjoin Defendants
22 and those acting in concert with them from using the Infringing Mark.

23
24
25 ⁸ In both *C21FC LLC v. NYC Vision Capital Inc.*, 2022 WL 2191934, at *9 (D. Ariz. June 17,
26 2022), and *Sutter Home Winery, Inc. v. Madrona Vineyards, L.P.*, 2005 WL 701599, at *13 (N.D.
27 Cal. Mar. 23, 2005), the plaintiffs had failed to demonstrate a likelihood of success on the merits
28 and there were facts indicating lack of harm. In the other cited cases, the courts credited the
defendants’ lack of intent to infringe. *Kiva*, 402 F. Supp. 3d at 899 (junior trademark user had used
mark in good faith for 8 years); *Champion-Cain v. Macdonald*, 2016 WL 7188242, at *9 (S.D. Cal.
Dec. 12, 2016) (less than three months before trial and no evidence of intent).

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Dated: October 22, 2024

COOLEY LLP

By: 
Bobby A. Ghajar
John Hemann
Judd D. Lauter

Attorneys for Plaintiff
CITY AND COUNTY OF
SAN FRANCISCO

Mary C. Richardson (Bar No. 208586)
Port Attorney
mrichrdson@portoakland.com
Kimberly I. McIntyre (Bar No. 184648)
Deputy Port Attorney
kmcintyre@portoakland.com
PORT OF OAKLAND
530 Water Street
Oakland, California 94607
Tel: (510) 627-1572 / (510) 627-1205

Eugene M. Pak (Bar No. 168699)
epak@fennemorelaw.com
FENNEMORE WENDEL
1111 Broadway, 24th Floor
Oakland, California 94607
Tel: (510) 834-6600 / Fax: (510) 834-1928

Stephen C. Willey (Bar No. 209164)
swilley@fennemorelaw.com
Brandi B. Balanda (*Pro Hac Vice*)
bbalanda@fennemorelaw.com
Christopher J. Lindemeier (*Pro Hac Vice*)
clindemeier@fennemorelaw.com
FENNEMORE CRAIG, P.C.
1425 Fourth Avenue, Suite 800
Seattle, Washington 98101
Tel: (206) 749-0500 / Fax: (206) 749-0500

Attorneys for Defendant and Counterclaimant City of
Oakland, a municipal corporation, acting by and
through its Board of Port Commissioners (Port of
Oakland)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN
FRANCISCO,

Plaintiff,

v.

CITY OF OAKLAND AND PORT OF
OAKLAND,

Defendants.

Case No. 3:24-cv-02311-TSH

**DECLARATION OF DR. CAROL A.
SCOTT**

Date: November 7, 2024
Time: 10:00 AM
Courtroom: E – 15th Floor
Trial Date: (None Set)

CITY OF OAKLAND, A MUNICIPAL
CORPORATION, ACTING BY AND
THROUGH ITS BOARD OF PORT
COMMISSIONERS (PORT OF OAKLAND),

Counterclaimant,

v.

CITY AND COUNTY OF SAN
FRANCISCO,

Counterclaim Defendant.

I, Carol A. Scott, declare as follows:

I. BACKGROUND AND QUALIFICATIONS

1. I am a Professor of Marketing Emeritus at the Anderson Graduate School of Management (“Anderson School”) at UCLA and an expert in marketing strategy and consumer and market research. I hold a Ph.D. in Marketing from Northwestern University, where my minor field of study was Social Psychology. I also received a Master of Science in Management degree from Northwestern University and a Bachelor of Science in Business and History Education degree from the University of Texas at Austin. From 1986 through 1994, I held several administrative positions with the Anderson School, including Chairman of the Faculty and Associate Dean for Academic Affairs. I served as the faculty director of the Anderson School’s Executive Program, a non-degree, certificate program for mid-level and senior managers, from 2009 through 2019, and I continue to teach in various executive education short courses for the Anderson School.

2. Over the past 40 years, I have taught courses on Marketing Strategy and Management, Consumer Behavior, Advertising, Distribution Strategy, and International Marketing to students in undergraduate and graduate education programs at UCLA, Stanford

1 Business School, Harvard Business School, and Ohio State University. I also have published
2 numerous journal articles, research reports, and book chapters on Consumer Behavior,
3 Marketing Research, and other marketing topics, a complete list of which is included in my
4 Curriculum Vitae, attached as Exhibit 1. I have served on the editorial boards of the *Journal of*
5 *Marketing*, *Journal of Marketing Research*, and *Journal of Consumer Research*. I have been a
6 member of the board of directors for Sizzler International, A-Fem Medical Corporation, Inc.,
7 and United Online, Inc.

9 3. I am also a founding partner at Crossfield Associates, a litigation analysis and
10 support firm. I have more than 30 years of experience in providing expert marketing analysis
11 and testimony in cases involving class certification, trademarks, copyrights, damages related to
12 infringement of intellectual property, and other questions of marketing strategy, such as
13 advertising, distribution, purchasing processes, and aspects of consumer behavior. My
14 expertise includes the development of surveys to determine consumer perceptions and beliefs,
15 the assessment of drivers of purchase, consumer perceptions of product features and advertising
16 claims, factors that influence pricing products in the marketplace, and consumers'
17 understanding of various marketing materials. A list of my recent testimony is attached as
18 Exhibit 2.

21 4. In these assignments, I have used my doctoral level training, approximately 40
22 years of conducting and teaching various topics within the field of marketing, and my
23 experience serving as a marketing expert on various boards of directors, to inform my work.
24 Specifically, with respect to my assignment in this matter, I have had extensive doctoral level
25 education in social and consumer psychology, which informs the determination of the
26 methodology appropriate for particular research questions for the construction of surveys
27

1 designed to investigate consumer attitudes, beliefs, and perceptions. I have had extensive
2 doctoral level education in the design, analysis, and interpretation of experiments designed to
3 determine causal relations (*i.e.*, those studies that show test and control stimuli and observe
4 reactions); have published research using this methodology in the most prestigious, peer-
5 reviewed social psychological journals (*Journal of Personality and Social Psychology*, *Journal*
6 *of Experimental Social Psychology*) and consumer behavior and marketing journals (*Journal of*
7 *Consumer Research*, *Journal of Marketing Research*, *Journal of Behavioral Decision Making*);
8 and have conducted many such studies for litigation in state and federal courts. I also have had
9 extensive doctoral level education in the design, analysis, and interpretation of consumer
10 surveys that are used in experimental as well as non-experimental studies to investigate
11 consumer attitudes, beliefs, and perceptions. I have personally designed and implemented
12 hundreds of consumer attitudinal surveys and experimental studies for litigation in state and
13 federal courts.
14
15

16 5. Documents considered in forming my opinions are cited herein and/or are listed
17 in Exhibit 3.
18

19 II. SCOPE OF ASSIGNMENT

20 6. I have been asked by counsel for the Port of Oakland (“Defendant”) to evaluate
21 and respond to the Expert Report of Sarah Butler, filed on behalf of Plaintiff City and County
22 of San Francisco (“Plaintiff”).¹ In particular, I was asked to determine the degree to which the
23 consumer survey conducted by Ms. Butler (“Butler Survey”) provides a valid and reliable
24 assessment of consumer confusion regarding the Port of Oakland’s decision to change the name
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26

27 ¹ Expert Report of Sarah Butler, June 27, 2024, (“Butler Report”).

1 of its airport (“OAK”) from “Metropolitan Oakland International Airport” to the “San
2 Francisco Bay Oakland International Airport” (the “New Name”).

3 4 III. SUMMARY OF OPINIONS

5 7. Based on my review of the Butler Report, the Butler Survey, and information
6 available to me at this time, I conclude that Ms. Butler provides no reliable basis to determine
7 the “extent to which Defendant Port of Oakland’s use of ‘San Francisco Bay Oakland
8 International Airport’ rather than ‘Oakland International Airport’ is likely to cause confusion
9 with Plaintiff’s ‘San Francisco International Airport’”² To the extent that the Butler Survey
10 itself can provide any useful data to answer this question, its results instead show that
11 consumers are *unlikely* to be confused by the use of the New Name.³

12
13 8. Specifically:

- 14 i. Skewed Survey Population: Ms. Butler’s survey cannot reliably predict
15 consumer confusion in the real world because its sample was drawn from an
16 under-inclusive population that excludes markets that currently account for the
17 largest number of Oakland passengers.
- 18
19 ii. Lack of External Validity—The Butler Survey Does Not Replicate the “Real
20 World”: Because Ms. Butler’s survey procedures do not correspond to key
21 features of the real-world context in which consumers would make judgments
22 and choices, the survey has no external validity. The survey results thus cannot
23 be generalized to the real-world environment where, specifically, consumers

24
25 _____
26 ² *Id.* at ¶16.

27 ³ I reserve the right to amend and/or change my opinions if additional information becomes
available that would warrant such amendments and/or changes.

1 would have more information relevant to their judgments and choices. The lack
2 of external validity renders the results of her confusion Question 2 in the survey
3 irrelevant.

4
5 iii. Lack of Internal Validity—A Causal Link between the New Name for OAK and
6 Any Confusion Observed Cannot Be Established: Data for those viewing
7 modified depictions of Southwest Airlines’ webpages must be disregarded
8 because the control group used for this setting cannot isolate the effects of
9 OAK’s name change from other plausible factors. In addition, one of the three
10 measures of “confusion,” i.e., “Which of the following airports, if any, is the
11 primary airport serving the San Francisco Bay Area?”, is not tied to a relevant
12 definition of confusion, i.e., this question in the survey does not necessarily
13 measure confusion between the San Francisco International Airport and the San
14 Francisco Bay Oakland International Airport.

15
16 iv. Inadequate Level of Alleged (Net) Confusion for the Only Valid and Reliable
17 Measure of Consumer Confusion Relevant to Selecting and Purchasing a Flight
18 to “San Fran”: No significant net confusion was found for those viewing
19 modified depictions of Google Flights webpages with respect to the only
20 potentially relevant and reliable confusion question in the survey, i.e., where do
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1 consumers think the [San Francisco Bay] Oakland International Airport is
2 located.⁴
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4 IV. BASIS FOR OPINIONS

5 A. Background

6 9. Ms. Butler stated that her assignment was “to design and conduct a survey to
7 evaluate whether the Metropolitan Oakland International Airport’s ... decision to change its
8 name to the ‘San Francisco Bay Oakland International Airport’ is likely to cause confusion
9 amongst relevant consumers.”⁵ To answer this question, Ms. Butler designed and fielded a
10 consumer experimental survey that showed respondents one of two mock-ups of internet
11 website pages. Half of the respondents in the Butler Survey were asked to view mock-up
12 depictions of webpages from one airline (Southwest Airlines), with the other half viewing
13 mock-up depictions of a third-party flight search site (Google Flights). Each of these webpages
14 ostensibly showed the initial process and some of the steps that consumers might take if they
15 were searching for flights to Northern California with the search term “San Fran” while using
16 the Southwest Airlines or the Google Flights website, as applicable.⁶ In each of these two
17 groups, respondents were shown one of two mock-up depictions of the webpages, either a
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21 ⁴ The text in brackets (“San Francisco Bay”) herein denotes the text that was added to the
22 beginning of the “Oakland International Airport” text for those respondents in the Butler
23 Survey’s test group; in other words, the test group respondents saw the new name “San
24 Francisco Bay Oakland International Airport.” In contrast, respondents in the control group
25 were exposed to text representing the “old” name, namely, “Oakland International Airport”
(without “San Francisco Bay” or the word “Metropolitan”).

26 ⁵ Butler Report, ¶8, pp. 4-5.

27 ⁶ The Butler Report does not define what type of real-world consumer confusion is of interest,
i.e., confusion amongst consumers with respect to what?

1 “test” version which used the New Name for OAK or a “control” version which in some cases
2 used the “Oakland International Airport” name.⁷

3 10. The Respondents were then asked three questions that purport to measure
4 confusion: (Question 1) “Where do you think the [San Francisco Bay] Oakland International
5 Airport is located?” (an open-ended question); (Question 2) “Do you think the [San Francisco
6 Bay] Oakland International Airport is ... The same airport as San Francisco International
7 Airport” or “A different airport from the San Francisco International Airport?”; and (Question
8 3) “Which of the following, if any, is the primary airport serving the San Francisco Bay Area?”
9
10

11 **B. Discussion**

12 **a. Opinion 1: Skewed Survey Population: Ms. Butler’s survey cannot**
13 **reliably predict consumer confusion in the real world because its**
14 **sample was drawn from an under-inclusive population that excludes**
15 **markets that currently account for the largest number of Oakland**
16 **passengers.**

17 11. While Ms. Butler drew her survey’s sample from a pool of consumers who
18 indicated that they are likely to book their own travel by air to Northern California in the next
19 year, Ms. Butler limited this pool to only those persons residing in one of ten (10) U.S. states
20 and the District of Columbia⁸ that are reportedly “unserved” for OAK.⁹ The Butler Report cites
21 a PowerPoint presentation as the source of this list of markets and airports but does not provide
22 any explanation or definition as to why these 11 locations were used. I have since been
23

24 ⁷ *Id.*, pp. 17-22 and at Exhibit F.

25 ⁸ These states were Arizona, Florida, Illinois, Louisiana, Michigan, New York, North Carolina,
26 Ohio, Pennsylvania, and Texas, as well as the District of Columbia.

27 ⁹ “Ex 6 Met OAK Presentation,” Port of Oakland PowerPoint file “41124 Presentation.pptx”, as
cited in the Butler Report at footnote 19.

1 informed that “unserved markets,” as used in the presentation, refers to certain airports with no
2 non-stop flights to Oakland,¹⁰ which Ms. Butler either did not know and/or failed to mention.
3 This set of markets excludes entirely 57% of the U.S. population from her sample, and, in
4 particular, excludes four of the five markets that provide the most passengers for OAK, i.e., Los
5 Angeles (California), Las Vegas (Nevada), San Diego (California), and Phoenix (Arizona).^{11, 12}
6 The resulting sample was therefore even more geographically constrained; 53% of respondents
7 who took the Butler survey resided in one of only *three* states (New York, Texas, and
8 Florida).¹³

10 12. The Butler Report fails to provide any rationale for the decision to sample only
11 from this small number of “unserved” states.¹⁴ Standard practice for likelihood of confusion
12 research is to select the market of the defendant that overlaps with that of the plaintiff, which in
13 this case is potentially nationwide.¹⁵ By limiting the sample population to only these ten states
14 and the District of Columbia, and excluding important markets like California, the Butler
15

17 ¹⁰ Conversation with counsel for Port of Oakland, October 5, 2024.

18 ¹¹ “Estimates of the Total Resident Population and Resident Population Age 18 Years and
19 Older for the United States, Regions, States, District of Columbia, and Puerto Rico: July 1,
20 2023 (SCPRC-EST2023-18+POP),” United States Census Bureau.

21 ¹² Conversation with counsel for Port of Oakland, October 5, 2024.

22 ¹³ See Butler Report, Table 2, p. 23.

23 ¹⁴ A review of the PowerPoint presentation from which Ms. Butler obtained the list of
24 “unserved” markets shows a total of 21 such markets in 12 U.S. states and the District of
25 Columbia. The pool of consumers from which the sample was drawn, however, did not include
the states of two of these markets, i.e., Indiana and Massachusetts. The Butler Report provides
no rationale for their exclusion.

26 ¹⁵ See generally Barber, W G. & G. E. Yaquinto, “The Universe,” in Shari S. Diamond and
27 Jere B. Swann (eds.), *Trademark and Deceptive Advertising Surveys: Law, Science, and
Design, Second Edition* (Diamond and Swann 2022), Chapter 3.

1 Survey samples only a small portion of relevant consumers searching for flights to Northern
2 California who potentially would be exposed to the new name during a search for flights.¹⁶
3 Thus, Ms. Butler’s sample is severely under-inclusive of OAK’s target market, one that can be
4 better described as all consumers in the United States that are planning to travel to Northern
5 California (or the San Francisco Bay Area), including those residing in California or other
6 nearby locations that provide a large number of passengers for OAK and presumably have a
7 greater familiarity with the Northern California/San Francisco Bay geographic area.¹⁷ The
8 findings of the Butler Survey thus cannot be used to provide a reliable estimate of the
9 likelihood of confusion in the overall target market.
10
11

12 **b. Opinion 2: Lack of External Validity—The Butler Survey Does Not**
13 **Replicate the “Real World”: Because Ms. Butler’s survey**
14 **procedures do not correspond to key features of the real-world**
15 **context in which consumers would make judgements and choices,**
16 **the survey has no external validity. The survey results thus cannot**
17 **be generalized to the real-world environment where, specifically,**
18 **consumers would have more information relevant to their judgments**
19 **and choices. The lack of external validity renders the results of her**
20 **confusion Question 2 in the survey irrelevant.**

21
22 13. One of the most important factors in establishing the external validity¹⁸ of a
23 survey is the degree to which information that is present in the real world and relevant to the
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28 ¹⁶ Survey respondents are told to “imagine [they] were shopping for a flight to Northern
29 California.” Butler Report, ¶29, p. 15,

30 ¹⁷ Ms. Butler’s sampling procedures required that half of her sample had “ever” flown to
31 Northern California, but the recency of such travel is unknown. She also did not ask whether or
32 not the respondent purchased that prior ticket for him/herself, or if it was purchased online.

33 ¹⁸ External validity is indicated by the degree to which the experimental setting replicates that
34 of the real-world setting of interest.

1 judgment or decision being measured in the survey is also present in the survey environment.¹⁹

2 An examination of Ms. Butler’s survey procedures clearly demonstrate that her survey does not
3 meet this requirement. Her study has no external validity, and thus the survey results cannot
4 serve as a reliable predictor of consumer decisions that would occur in the real world.²⁰
5

6 **2. The Butler Study Does Not Use Stimuli That Represent the Current Real**
7 **World.**

8 14. As a practical matter, the Butler survey does not replicate the real world because
9 neither Southwest Airlines nor the other six major domestic airlines that fly into and out of
10 OAK’s use airport names on their webpages to identify the airport options.²¹
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20 ¹⁹ See Simonson, Itamar and Ran Kivetz, “Demand Effects in Likelihood of Confusion
21 Surveys: the Importance of Marketplace Conditions,” in Shari S. Diamond and Jere B. Swann
22 (eds.), *Trademark and Deceptive Advertising Surveys: Law, Science, and Design, First Edition*,
23 Chapter 11, pp. 243-259. See also Shadish, William R., Thomas D. Cook, and Donald T.
Campbell, *Experimental and Quasi-Experimental Designs for Generalized Causal Inference*,
Houghton Mifflin Col, 2002 (“Cook and Campbell 2002”).

24 ²⁰ *Id.*

25 ²¹ See Exhibit 5. Alaska Airlines does not use the full airport name but instead lists
26 *abbreviated* airport names but does so along with city and state locations as well as airport
27 codes such as: ”Oakland, CA (OAK – Oakland Intl.)” and ”San Jose, CA (SJC – San Jose
Intl.)”

Southwest Airlines | Book Flight

Log in to view points balance Log in Create account Español

FLIGHT | HOTEL | CAR | VACATIONS SPECIAL OFFERS RAPID REWARDS®

MAY TRAVEL INCLUDED

Wanna Get Away™ One-way as low as* \$140

San Francisco Area Airports

- ☒ San Francisco Area Airports
 - ☐ San Francisco, CA - SFO
 - ☐ San Francisco Bay Oakland International Airport, CA - OAK
 - ☐ San Jose, CA - SJC

Keyboard instructions: Down/Up arrow keys: Change focused selection. Enter key: Finalize/toggle selection.

Book now

FLIGHT STATUS CHANGE/CANCEL

Baggage and optional fees: Dollars Points

RETURN DATE PASSENGERS

5/01 5/04 1

PROMO CODE (optional) Advanced search Search

Where we fly Low Fare Calendar Explore destinations

The flexibility you want

- Two bags fly free!¹
- No change² or cancel fees.³
- Rapid Rewards® points don't expire.⁴
- Flight credits don't expire.
- FREE same-day standby with all fares.⁵

Wanna spring into summer?

Earn 50,000 points.

Learn more >

¹Two bags, at Southwest.com/terms. ²Not cancel reservations at least 14 minutes prior. ³Understand ⁴Spends more to book and book their award points and be rewarded

The Southwest Airlines control webpages, however, do not reflect this hypothetical world of a changed Southwest Airlines policy, but instead remain in the current real world with no

²² Strangely, in this hypothetical world created by Ms. Butler’s Southwest Airlines test webpages, Southwest Airlines not only decides to change its long-standing policy of not using airport names (*see* Declaration of Jennifer Bridie, October 4, 2024), but it inexplicably does so only for OAK on the first pop-up menu that lists alternative airports for the San Francisco Bay Area (i.e., in contrast, SFO and SJC are still listed only by city and airport code). The control webpage, however, does not enter the hypothetical world of a changed Southwest Airlines policy, but instead remains in the real world with no apparent changes from what Southwest Airlines actually shows on its website.

1 apparent changes from what Southwest Airlines actually shows on its website, i.e., all airports
2 indicated only by city names and airport codes.

3 16. For the Google Flights platform, the Butler Survey does not use the actual
4 Google Flights webpages as they currently appear when one enters “San Fran” as the search
5 term. At the present time, a search for flights to “San Fran” brings up a pop-up menu that
6 includes the heading of “San Francisco, California/City in California,” with only the “San
7 Francisco International Airport SFO” and “11 mi to destination” indented under the heading.
8 This is followed by a second heading of “San Francisco Bay Area, Region in California.” No
9 listing for OAK is shown in the pop-up menu. The only airport shown, other than SFO, is that
10 of “San Francisco d’Assisi Airport PEG, International Airport in Italy.”²³ Ms. Butler does not
11 explain what she based the survey’s Google Flights’ webpages on. Webpages for both
12 platforms thus do not replicate the webpages in the real world, but instead “replicate”
13 webpages, at best, in a hypothetical world that does not exist, and may never exist.
14
15

16 **3. The Butler Survey Does Not Show Respondents All Relevant Webpages**
17

18 17. The Butler Survey procedures also fail to show respondents all of the pages (and
19 thus all of the information) that consumers would have to view in order to actually select and
20 book a flight, the required precursor to going to or arriving at an unintended airport. Each
21 additional page that consumers must view in order to actually purchase or book a flight
22 contains additional cues that could alert a consumer as to the true identity and location of the
23 airports. Had the respondents who were shown the mock-up depiction of a Southwest Airlines
24 website, for example, been allowed to click on the downward arrow next to each airport listed
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²³ Google Flights webpage accessed October 7, 2024. *See* Exhibit 4.

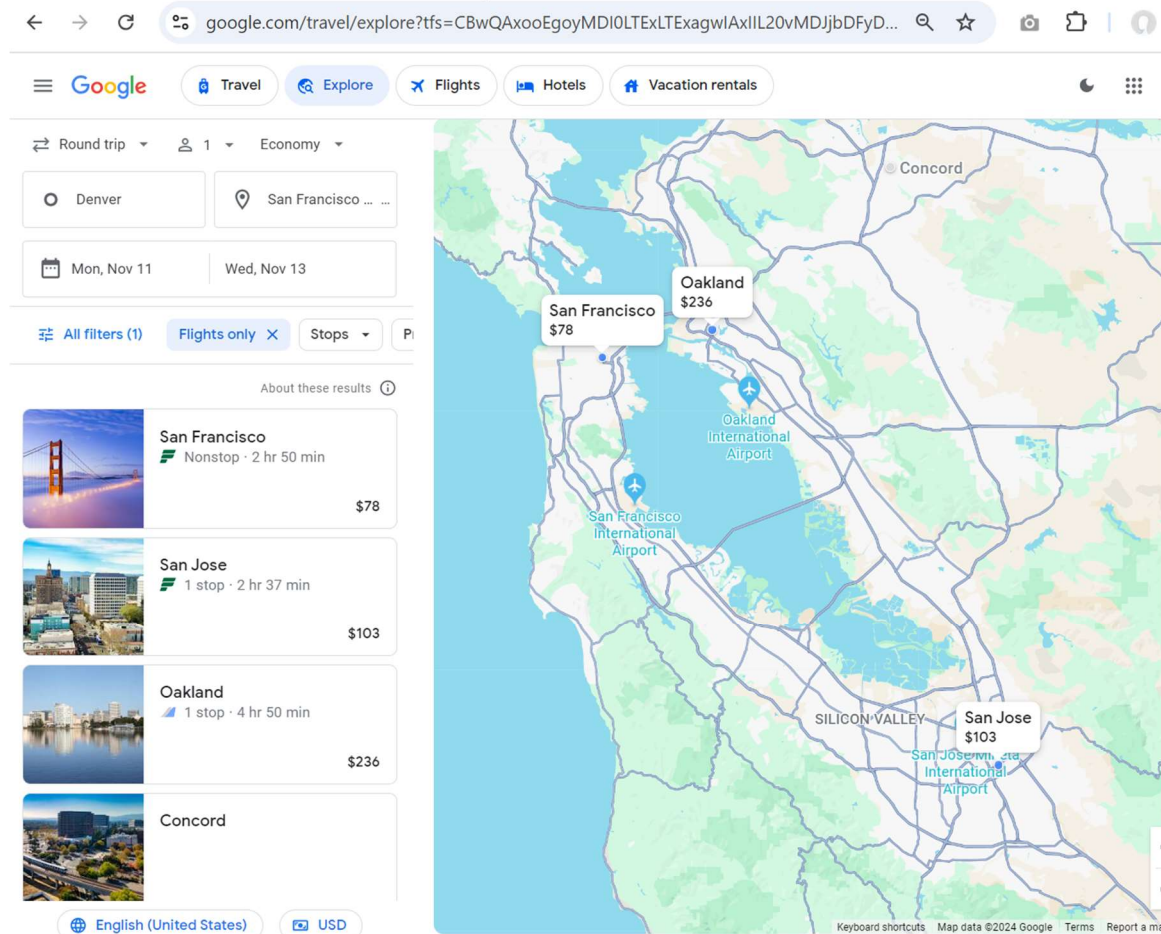
on one of the webpages they saw – which they would have had to do in order to see the available flights, select one, and then follow through to purchase a ticket – they would be exposed to further cues as to the locations of and the differences between the airports that would clearly indicate that each one is a different airport with a different airport code and with different flights available. An example of what a consumer would see on this further page is shown in Figure 2 (accessed October 7, 2024). The same is true for Google Flights stimuli, which shows only a single page that contains the menu of airport options that pops up when one types “San Fran” into the search bar. If a consumer were to click to view “All San Francisco Airports” a map of the area and airports would appear (Figure 3) (accessed October 7, 2024).

Figure 2

The screenshot shows the Southwest Airlines website interface. At the top, the URL is southwest.com/air/booking/select-depart.html?adultPassengersCount=1&adultsCount=1&clk=GSUBNAV-AIR-B... The page header includes the Southwest logo, user information (Hi, Tim, 15,672 points), and account links (My Account, Log out, Español). The main heading is "Depart: DEN → San Francisco" with a "Modify" button. Below this, it specifies "Denver, CO - DEN to San Francisco Area Airports". A date selector shows "Nov 11" as the selected date. A "Low Fare Calendar" and a promotion "Earn 2 points per \$1 on this flight with your Rapid Rewards® Plus Card" are also visible. The flight search results are for "DEN → OAK" (Denver, Colorado to Oakland, California). The results are filtered by "Nonstop" and "All day". The table below shows three flight options:

Departing flights: Nonstop	Number of stops	Duration	Business Select	Anytime	Wanna Get Away <i>plus</i>	Wanna Get Away
# 444 6:05 AM → 8:00 AM	Nonstop	2h 55m	\$289	\$239 <i>3 left</i>	\$179 <i>3 left</i>	\$159 <i>3 left</i>
Fastest # 1869 9:50 AM → 11:30 AM	Nonstop	2h 40m	\$576	\$551	\$292 <i>3 left</i>	\$272 earn 1,434 pts
Fastest # 2432 2:50 PM → 4:30 PM	Nonstop	2h 40m	\$576	\$551	\$429 <i>2 left</i>	Unavailable

Figure 3



4. Respondents Are Not Allowed to View the Webpages and the Information in Them as They Would in the Real World.

18. In the real world, consumers would be looking at the relevant webpages when searching for an airport and/or flights and would be able to go back and review all of the information on the webpage when making judgments or purchasing decisions.

19. In the Butler Survey, however, those webpages were removed and the multiple, relevant cues on them were not available to respondents when they were asked about their judgments and beliefs. The lack of correspondence between the information available in the real world and the information available in the survey when forming judgments and beliefs makes the level of confusion observed in the Butler Survey an unreliable predictor of the

1 likelihood of confusion in the real world, i.e., we cannot say what level of confusion, if any,
2 would occur in the real world.²⁴ Further, respondents taking a survey rarely are as motivated
3 and as focused as consumers who are actually trying to search for flights with the intention of
4 making a purchase, making it even more important that cues that could easily be used in the
5 real world be equally easy to use in the survey.²⁵
6

7 20. The effect of not replicating the information accessible in the real world when
8 asking for judgments or opinions in the survey is seen in particular when considering responses
9 to the second confusion question (Q2: “Do you think the [San Francisco Bay] Oakland
10 International Airport is the same airport as the San Francisco International Airport, a different
11 airport from the San Francisco International Airport, or you don’t know or are unsure?”). If
12 one were looking at the webpages as one would in the real world when searching for and
13 selecting an airport and a flight, it would be obvious that the airports are different—why would
14 an airline or a search platform list two names or entries, two different airport codes (which was
15 not included in the survey question) and different flights if the airports are really one and the
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20 _____
21 ²⁴ For example, to the extent that respondents were not allowed to view the webpages as they
22 were asked about their judgments and beliefs as they would be in the real world, any estimate
of net confusion would be biased in a positive direction.

23 ²⁵ See Allenby, Greg, Geraldine Fennell, Joel Huber, Thomas Eagle, Tim Gilbride, Dan Horsky,
24 Jaehwan Kim, Peter Lenk, Rich Johnson, Eli Ofek, Bryan Orme, Thomas Otter, and Joan
Walker, “Adjusting Choice Models to Better Predict Market Behavior,” *Marketing Letters*, vol.
25 16, no. 3-4, Sixth Invitational Choice Symposium, December 2005 (“Allenby et al. 2005”), pp.
197-208. See also Simonson, Itamar and Ran Kivetz, “Demand Effects in Likelihood of
26 Confusion Surveys: the Importance of Marketplace Conditions,” in Shari S. Diamond and Jere
B. Swann (eds.), *Trademark and Deceptive Advertising Surveys: Law, Science, and Design*,
27 *First Edition*, Chapter 11, pp. 145-154.

1 same airport?²⁶ Not only were the respondents in the Butler Survey unable to view the actual
2 webpages when answering this question (which they may never have even considered without
3 being asked in the survey), the question itself did not include the airport codes (e.g., OAK) for
4 the airports which were shown on all of the survey webpages. Seeing a different airport code
5 for the two airports in the questions, as was done on the webpages, would have been a clear cue
6 that the airports are not one and the same.
7

8 21. Finally, the Butler Survey was conducted at only one point in time which is
9 likely to inflate the level of “net” confusion observed, i.e., during the 30 days in which the new
10 name was being rolled out to potential consumers. At this point in time, consumers
11 undoubtedly already had knowledge and prior experience with the prior airport name because it
12 has been used and promoted in marketing materials for many years, thus lowering the level of
13 any confusion observed in response to the control webpages not because of the name, per se,
14 but because of a long history of use and promotional materials. In the real world, the multiple
15 cues typically provided in the context of a search for and selection of an airport and flight may
16 preclude confusion even for a new, unfamiliar name.
17

18 22. In summary, the results of the Butler Survey, and particularly the results of
19 Question 2 in the survey, cannot be generalized to the real world in which consumers would
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21
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24 _____
25 ²⁶ For the Southwest Airlines test web pages, two cities and only one airport name (for OAK)
26 are listed on the first page, and three airport names are listed on the second page. For the
27 Southwest Airlines control web pages, three cities, but no airport names are listed on either the
first or second page. For the Google Flights test and control pages, two airport names (for SFO
and OAK) are listed.

1 have additional diagnostic information about each airport.^{27,28} As a practical matter, it may be
2 difficult to obtain a reliable estimate of the likelihood that consumers in the real world who
3 would be confused by a change in the name of OAK because they are likely to be exposed to
4 many types and sources of information. A study conducted by Ipsos in March 2023 found that
5 three out of four air trips taken by Americans in 2022 were taken for personal reasons.²⁹ Of
6 those flying for personal reasons, 70% of consumers in the Ipsos study said that they visit one
7 or more airline mobile apps or websites to research options before making a purchase and 80%
8 report consulting more than one “site/agencies/companies” before making a final purchase.
9
10

11 **a. Opinion 3: Lack of Internal Validity—A Causal Link between the**
12 **New Name for OAK and Any Confusion Observed Cannot Be**
13 **Established: Data for those viewing modified depictions of**
14 **Southwest Airlines webpages must be disregarded because the**
control group used for this setting cannot isolate the effects of
Oakland’s name change from other plausible factors. A second

15 ²⁷ Notably, at present, the Southwest Airlines website, like other airline sites, generally does not
16 include airport names, but instead uses city names and airport codes (e.g., SFO, OAK, SJC),
17 which is what Ms. Butler used for the Southwest control webpages in her survey. (See the
18 declaration of Jennifer Bridie, October 4, 2024). In order to create stimuli for the test
19 webpages for Southwest Airlines, however, Ms. Butler modified the actual first Southwest
20 Airlines webpage by replacing the city name “Oakland, CA” with the airport name “San
21 Francisco Bay Oakland International, CA” yet leaving the other alternative airports, i.e., SFO
22 and SJC, identified by only their city names and airport codes.

21 ²⁸ Using Google Flights, a consumer is also likely to be exposed to further cues about each
22 airport they see if they use the site to find available flight options and purchase a ticket.
23 Notably, however, at the present time, Google Flights does not even list OAK when a consumer
24 types “San Fran” into the search bar, unlike the mock-up depiction of Google Flights used in
25 the Butler Survey. On October 7, 2024, however, I observed that the Google Flights website
26 showed only San Francisco International Airport when using the search term “San Fran.” The
27 site does not show “San Francisco Bay Oakland International Airport” or “Oakland
International Airport” as an option even if the website may have done so in the past. Further,
only the Sacramento Airport is shown if the consumer enters “Northern California” as the
search term. See Exhibit 4.

²⁹ “Air Travelers in America: Key Findings of a Survey Conducted by Ipsos” pp. 9, 13-14.

1 aspect of internal validity is also violated because one of the
2 measures, “What of the following [among a list of airport names
3 including San Francisco Bay Oakland International Airport, San
4 Francisco International Airport, San Jose Mineta International
5 Airport and Something Else and Don’t Know /unsure] is the
6 primary airport serving the San Francisco Bay Area does not
necessarily measure relevant confusion or imply that a ‘confused’
consumer would necessarily select and purchase a ticket to the
wrong airport.

7 23. While external validity ensures that the results of the survey can be generalized
8 to the real world context of interest, internal validity ensures that a causal nexus can be made
9 between the feature of interest, here the airport name, and the construct of interest, here
10 confusion as to which airport should be selected and purchased in order to go a preferred
11 destination or location. Without internal validity, the study construction cannot be used to draw
12 a valid conclusion with respect to the effects of the variable of interest.
13

14 24. Standard procedure to measure any increase in consumer confusion due to a new
15 name for OAK would be to compare the level of confusion that occurs when respondents are
16 shown a relevant real-world stimulus that uses the “old” name (i.e., a control stimulus) with the
17 level of confusion that occurs when a separate group of respondents are shown a stimulus that
18 is exactly the same except for the use of the “new” name (i.e., a test stimulus).³⁰ If respondents
19 are randomly assigned to see either the control or the test stimulus, and if there is no difference
20 between the two stimuli shown except the difference in the name of the airport, then scientific
21 principles allow one to attribute the difference in the levels of confusion to the change in the
22
23

24 _____
25 ³⁰ Standard and proper research practice would be to choose a control stimulus that is as close
26 to the test stimulus as possible but alters or removes the allegedly infringing mark (*see*
27 Diamond and Swann 2022, Chapter 9). In the present case, the proper control to test any
confusion by the change from the old name to the new name would have been to at least use the
prior name used, “Oakland International Airport.” [See Butler Expert Report, ¶40, p. 20.]

1 name. Although Ms. Butler cites this scientific rule for the creation of an appropriate control
2 group, she did not abide by it in creating the Southwest Airlines test and control groups.³¹ This
3 can be seen by examining the different aspects of the test and control stimuli used in the Butler
4 Survey.

5
6 **5. Test and Control Stimuli Differed in Ways Other Than the Airport Name.**

7 25. The Southwest Airlines test and control stimuli preclude the establishment of a
8 causal relationship between the change in the airport name and any consumer confusion
9 because they differ with respect to a feature, in addition to the different airport name, which
10 may have affected the responses to the survey's confusion questions. Thus, the effect of the
11 different airport name cannot be isolated from the effect of this other feature.

12
13 26. Specifically, the first Southwest Airlines webpage shown to all respondents
14 showed a pop-up menu indicating that a respondent should choose between three San Francisco
15 Bay Area airports after doing a search for flights to "San Fran."³² In the test condition, only
16 OAK is identified by its full airport name as if it were a California city: "San Francisco Bay
17 Oakland International Airport, CA – OAK."³³ The other two airports are listed using only the
18

19
20 ³¹ See Butler Expert Report, ¶40, p. 20: [To establish causality, the control stimulus must be]
21 "as close to the test stimulus as possible but alters or removes the allegedly infringing
22 material."

23 ³² Prior to seeing any webpages, all respondents were told to "Please imagine you were
24 shopping for a flight to Northern California. On the next [few pages/page] you will be shown
25 some information you might see if you were looking to purchase a flight." After this,
26 respondents were shown the first Southwest Airlines webpage as if the person searching has
27 entered "San Fran" as the intended destination. I can find nothing in the survey that would
explain to the respondent why "San Fran" was the selected search term for Northern California
flights, nor a reason why this change in terms was not made clear to the respondents.

³³ See Butler Expert Report, Exhibit F.

1 relevant cities' names, "San Francisco, CA – SFO" and "San Jose, CA – SJC" as is the current
2 Southwest Airlines practice. The letters "San Fran" were bolded for both the San Francisco
3 airport and OAK entries. The same webpage for the control group respondents did not include
4 any airport names. In addition, "San Fran" was highlighted only for the San Francisco, CA –
5 SFO entry.
6

7 27. Thus, the test webpage differs from the control webpage in that OAK is singled
8 out for special emphasis, as well as for being designated by its airport name rather than by the
9 name of the city only. Any differences in responses to the test versus the control group, then,
10 could be due to extra attention being drawn to OAK in the test stimuli. In particular, the
11 highlighting of "San Fran" in OAK listing along with suggesting that this is a city like the other
12 airport listings (i.e., the use of a comma after the airport name followed by "CA") may have led
13 respondents to indicate in the second survey confusion question that there is another airport
14 located in San Francisco, CA. The survey question itself also did not include the airport code
15 for the San Francisco Bay Oakland International Airport, and thus did not include this
16 important cue that was present in the test page. In addition, singling out OAK for special
17 attention – the only airport named – in particular could have caused respondents in the
18 Southwest Airlines test condition to assume that it must be the main or "primary" airport for the
19 San Francisco Bay Area (Question 3 of the survey).
20
21

22 **6. The Control Does Not Measure Confusion Due to a Change in the Airport**
23 **Name.**

24 28. A second fatal problem with the Southwest Airlines control stimuli arises
25 because the control is not consistent with Ms. Butler's hypothetical test condition. Specifically,
26 the control stimuli for the Southwest webpages did not adhere to Ms. Butler's "new" protocol
27

1 of showing the airport name for OAK (whereby OAK would have been listed in the control as
2 “Oakland International Airport – OAK”), but instead followed the current real-world protocol
3 of using city name and code, and no airport names at all. To measure the difference in
4 confusion specifically due to a change in the airport name, the control condition should have
5 listed OAK with its prior name and airport code, just like Ms. Butler listed OAK with its New
6 Name and airport code in the test webpages, to account for or control for any confusion the use
7 of this “old” name might cause.³⁴

9 29. Thus, the findings for the Southwest Airlines website must be discarded as
10 scientifically unsound because the test and control conditions differ in ways other than different
11 airport names.

13 **7. Google Flights Stimuli Are Also Problematic.**

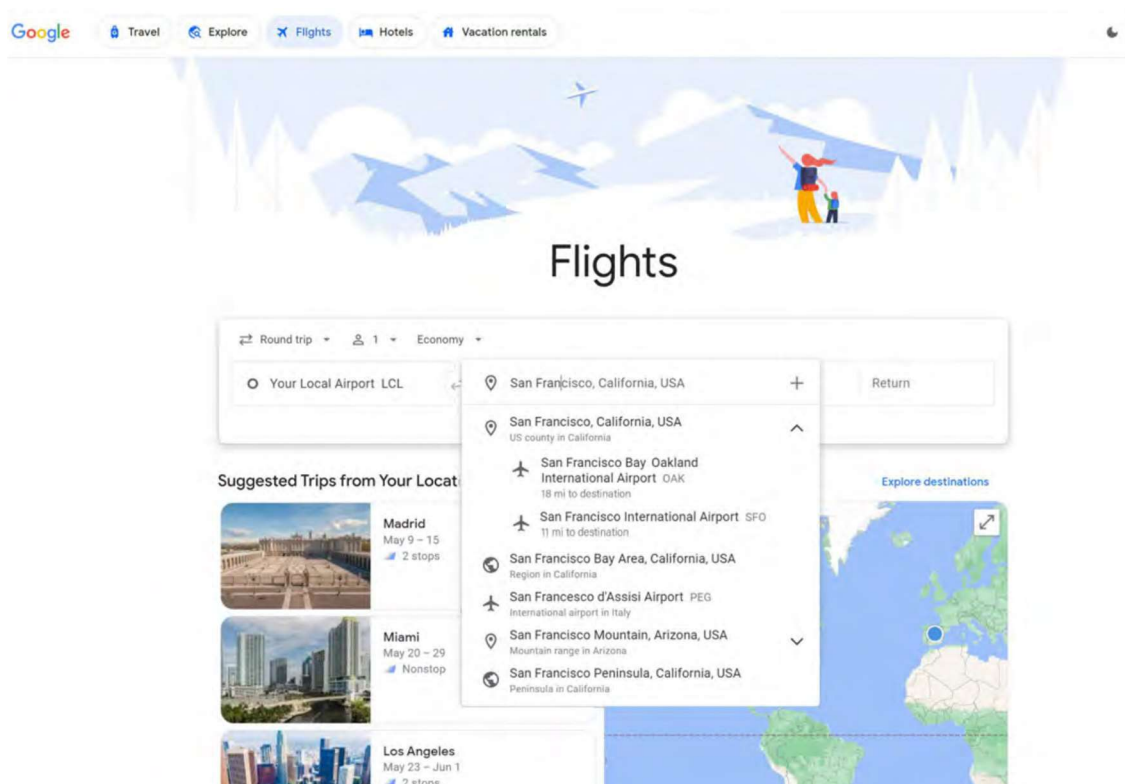
14 30. The control group for the Google Flights webpages may be similarly flawed but
15 it is unclear what modifications Ms. Butler made to the actual Google Flights webpages.³⁵
16 Unlike the Southwest control stimuli, the Google Flights control stimulus does allow for a
17 comparison of the use of the “new” name in the test condition versus the use of the “old” name
18 in the control condition. However, it is unclear how Ms. Butler may have altered the actual
19 Google Flights webpages. In particular, the way in which OAK is presented on the page as
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23
24 ³⁴ By using this control, Ms. Butler apparently assumes that no consumers are confused by the
25 “old” OAK name, which is very unlikely. For example, some consumers might misread or be
26 confused by the word “International” and the inclusion of “Oakland International” under the
27 heading of “San Francisco Area Airports.” Thus, the amount of confusion shown in Ms.
Butler’s control condition is likely to be too low.

³⁵ See Butler Expert Report, Exhibit F.

well as the name itself may have been changed, and the rationale for any change other than the airport name would need to be justified.

Figure 4³⁶



31. As shown in Figure 4, the webpages used in Ms. Butler's experiment shows OAK (i.e., either "San Francisco Bay Oakland International Airport" or "Oakland International Airport") as well as the "San Francisco International Airport" indented under the heading "San Francisco, California, USA" with a second line in smaller type of "U.S. County in California." Next, a non-indented heading, "San Francisco Bay Area, California" with a second line reading "Region in California" is listed. This arrangement may have suggested to the respondent that OAK is located in San Francisco County (which it is not) rather than in the greater San

³⁶ The Butler Survey control condition for Google Flights was exactly the same, except that OAK was instead listed as "Oakland International Airport."

1 Francisco Bay Area. Respondents who saw the control stimuli with the name “Oakland
2 International” may have already known where and what this airport is, but test respondents are
3 seeing something new and previously unheard of, and thus the heading under which the airport
4 is listed could be a more important cue to them.

5
6 32. It is notable that this is not the way in which OAK was presented on the Google
7 Flights webpage when I conducted the same search as the Butler survey in May 2024. The
8 results of that search are shown in Exhibit 4. Specifically, when I searched Google Flights
9 using the search term “San Fran”, the new name (“San Francisco Bay Oakland International
10 Airport”) was shown, but it was not nested under “San Francisco, California” (the actual
11 Google Flights webpage also included a second line in smaller type of “City in California”
12 rather than “US County in California”). Instead, only “San Francisco International Airport”
13 (with a second line of “11 miles to destination”) was shown under that city heading. As seen in
14 Exhibit 4, “San Francisco Bay Oakland International Airport” was listed, but not indented
15 under any heading. It also was followed by a second line in smaller type reading,
16 “International Airport located in Alameda County.” It was listed immediately above an item
17 which read “San Francisco Bay Area, California,” with a second line in smaller type reading
18 “Region in California.”³⁷ The webpage that resulted from my search is important because it
19 shows how Google Flights actually did display OAK at one point after its change of name.
20
21

22 33. Because Ms. Butler did not provide a screenshot of the actual Google Flights
23 webpage that she used to create those stimuli (before she altered it, presumably with image
24

25 ³⁷ The Google Flights webpage apparently has changed again and as of October 7, 2024 does
26 not show a listing for OAK at all when the search term “San Fran” is typed in. This is
27 presumably due to Google Flights also reverting to the old Oakland Airport name, rather than
the New Name it previously used. See Exhibit 4.

1 editing software), I cannot determine whether she modified the formatting and placement of
2 OAK, whether she was modeling her stimuli on an actual Google Flights webpage, or whether
3 she created the Google Flights webpage in some other way. If Ms. Butler modified the
4 placement of OAK from what Google actually used, then her stimuli would not represent what
5 consumers actually saw in the real world and a rationale would need to be provided for this
6 deviation.
7

8 34. While it could be argued that the placement of OAK in the Butler Survey was
9 the same for both test and control conditions and thus any differences in responses cannot be
10 due to a difference in placement between the two conditions, it is possible that responses to
11 “San Francisco Bay Oakland International” would be differentially affected by its placement
12 under the heading “San Francisco, California, USA/US County in California” as well as the
13 removal of the second line, “International Airport in Alameda County.” The actual placement
14 and content of OAK entry may have provided such clear information about the location of
15 OAK that little confusion would be seen in either the test or the control conditions.
16

17 **Confusion Question 3 (regarding the “primary” airport serving the San Francisco**
18 **Bay Area) is Ambiguous, Has Methodological Problems, and Is Not Clearly**
19 **Related to Confusion About OAK.**

20 35. I have previously explained why the second confusion question (regarding
21 whether the San Francisco Bay Oakland International Airport is the same airport as the San
22 Francisco International Airport) is flawed and cannot provide a reliable prediction of the level
23 of confusion in the real world. Question 3 (“Which of the following, if any, is the primary
24 airport serving the San Francisco Bay Area?”) is also flawed from an internal validity
25 standpoint for two reasons: (1) it is not clear how respondents might have interpreted the term
26
27

1 “primary”³⁸ and (2) because it is not clear that the “wrong answer” with respect to which
2 airport is the primary one for the San Francisco Bay Area indicates confusion as to where one
3 would depart from and arrive at if consumers select the San Francisco Bay Oakland
4 International Airport.

5
6 36. First, Question 3 is not directly related to the question of whether consumers
7 would believe that they would be flying into the City of San Francisco or into SFO when they
8 would actually be flying into Oakland if they chose the San Francisco Bay Oakland
9 International Airport. Ms. Butler assumes that indicating the San Francisco Bay Oakland
10 International Airport is the “wrong” or a “confused” answer because she assumes that all
11 respondents define “primary” the same way that she intended, i.e., that “primary” means the
12 airport that serves the largest number of passengers. But the Butler Survey did not provide
13 respondents with a definition of “primary,” nor did Ms. Butler report any pre-test of Question 3
14 to ascertain respondents interpretation of the word “primary,” i.e., one could think that the San
15 Francisco Bay Oakland International Airport is the primary airport, but still understand clearly
16 that it is not located in San Francisco and that it is not the San Francisco International Airport.
17 If respondents interpret “primary,” for example, as being the most centrally located airport in
18 the San Francisco Bay Area or the airport serving the largest portion of the entire San Francisco
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23 ³⁸ Ms. Butler claims that the “right” answer is the San Francisco International Airport, because
24 it is the “largest or primary airport serving the Bay Area” with “primary apparently meaning it
25 offers the largest number of flights and seats scheduled for service” (Butler Report at ¶34).
26 Since we do not know if Ms. Butler pre-tested this question, we do not know if this is how
27 respondents understood the term “primary.” It is possible that respondents thought of the
primary airport as the one most convenient to them, or the one that serves the largest
geographical portion of the Bay Area. In this case, it is debatable as to which airport would be
the correct answer.

1 Bay Area, then they may have believed that OAK, the “San Francisco Bay Oakland
2 International Airport,” is the appropriate choice and therefore selected it.

3 37. Secondly this third question was only asked of those respondents who
4 previously indicated that the [San Francisco Bay] Oakland International Airport is not the same
5 airport as the San Francisco International Airport or were unsure, because Ms. Butler
6 speculates that they may have really believed that the San Francisco Bay Oakland International
7 Airport is SFO but they were unsure of the name “San Francisco International Airport.”³⁹ This
8 is only speculation, however, and in addition is inconsistent with the view expressed in
9 Plaintiff’s Motion for Preliminary Injunction that the name “San Francisco International
10 Airport” has been in use and widely publicized in marketing materials for many years and is
11 quite well known among consumers.⁴⁰
12

13
14 38. For all these reasons, the responses to the flawed Question 3 regarding the
15 “primary” airport of the San Francisco Bay Area cannot be relied upon to ascertain or predict
16 consumer confusion caused by the name change. It does not necessary measure what the
17 Report says it does, and thus it cannot establish any causal connection between the use of the
18 New Name and consumer confusion.
19

20 39. Thus, the findings for the Southwest Airlines website must be discarded as
21 scientifically unsound because the test and control conditions differ in ways other than different
22 airport names. Further, the findings for Question 3 must also be discarded due to its
23 methodological flaws.
24

25
26 ³⁹ Butler Report, ¶34.

27 ⁴⁰ Plaintiff City and County of San Francisco’s Notice of Motion and Motion For Preliminary
Injunction Enjoining Defendants; Memorandum of Points and Authorities In Support Thereof
 (“Motion for Preliminary Injunction”), September 17, 2024, pp. 12-24.

1 a. **Opinion 4: Inadequate Level of Alleged (Net) Confusion for the**
2 **Only Valid and Reliable Measure of Consumer Confusion Relevant**
3 **to Selecting and Purchasing a Flight to “San Fran”: No significant**
4 **net confusion was found for those viewing modified depictions of**
5 **Google Flights webpages with respect to the only potentially relevant**
6 **and reliable confusion question in the survey, i.e., where do**
7 **consumers think the [San Francisco Bay] Oakland International**
8 **Airport is located.**

9 40. I have demonstrated previously that the responses to the Southwest Airlines
10 pages must be disregarded not only because the pages failed to replicate the real-world
11 consumer decision-making environment, but also because the lack of a scientifically valid
12 control group for the Southwest Airlines portion of the survey prevents any possibility of a
13 causal connection between any confusion observed in response to the New Name attributable to
14 the change in the name of OAK.

15 41. The portion of the survey involving Google Flights webpages also suffers from
16 serious methodological flaws—most importantly the failure to replicate key features of the
17 actual information environment in which consumers would search for and select airports and
18 flights, and a failure to disclose what the actual Google Flights webpage used to create the
19 control stimuli was.

20 42. Regardless of these flaws, an analysis of the responses to the first open ended
21 confusion question (“Where do you think the [TEST ONLY: San Francisco Bay] Oakland
22 International Airport is located?”) for those respondents viewing the Google Flights webpages
23 may be instructive.⁴¹ If this analysis is performed, the resultant “net” percentage of confusion –

24
25 ⁴¹ As noted above, the resulting “net” confusion with respect to this question could also be a
26 conservative measure, since to the extent that respondents were not allowed to view the
27 webpages as they were asked about their judgments and beliefs as they would be in the real
28 world, any estimate of net confusion would be biased in a positive direction.

1 approximately 5% – would instead indicate that an insignificant amount of consumers would be
2 confused as to location of the San Francisco Bay Oakland International Airport.

3 43. The geographic location question (Question 1) speaks to the situation of a
4 traveler finding him/herself at OAK when he or she intended to go to the San Francisco
5 International Airport, and it assesses whether the change in the name of the airport itself is
6 likely to generate such confusion. In addition, both the test and control stimuli contained very
7 little information, other than the name of the airport, about the location of the airport, i.e., both
8 the test and control stimuli included the “distance to the destination” of San Francisco, CA
9 county in very small type under the name of both the Oakland and the San Francisco airports.
10 The stimuli, however, did show the airport code for each airline, but that code was not given in
11 the question regarding the airport’s location which might have decreased any confusion
12 observed. Finally, the location question was open-ended. It was not a multiple-choice type of
13 question in which the respondent is shown and asked to select from a list of possible answers.
14 Instead, respondents were asked to write in, in their own words, where they thought OAK was
15 located.

16 44. The Butler Report does not provide the results for Question 1 (geographic
17 question) for each website separately, i.e., for the Google Flights website versus the Southwest
18 Airline website, nor did the report include a copy of the coding sheet which would indicate how
19 each verbatim response to the location question was coded or categorized as indicating “San
20 Francisco” or another location. Nevertheless, I and members of my staff under my direction
21 examined the verbatim responses given in response to Question 1 and categorized the responses
22 in the manner that Ms. Butler indicates that she did, e.g., a response was coded as “San
23 Francisco” only if the respondent specifically indicated San. Francisco. References to San
24
25
26
27

1 Francisco in broader terms were coded as “other.” Using the resulting codes, I was able to
2 determine that approximately 23% of respondents who saw the test Google Flights webpages
3 using the New Name for OAK indicated that it is located in San Francisco versus 18% of
4 respondents who saw the control Google Flights webpages using the “old” name. The resultant
5 “net percentage” of confusion **is only 5%**, a level that would not generally be considered
6 significant in legal proceedings.⁴²
7

8 V. SUMMARY

9 45. In summary, as shown in my analysis, the Butler survey cannot be used to
10 predict the level of confusion that would result in the real world if OAK's name is changed to
11 San Francisco Bay Oakland International Airport. It does not use a sample representative of
12 OAK's entire target market, the survey stimuli do not represent the real world decision context,
13 and the survey itself cannot establish a causal nexus between the change in OAK's name and
14 any confusion amongst consumers. Only one of the three survey questions can be used as valid
15 and reliable measures of confusion, and analysis of the only reliable data, i.e., that of the
16 Google Flights platform, for the one reliable and valid consumer measure shows that
17 consumers are unlikely to be confused by OAK's new name.
18
19

20 VI. COMPENSATION

21 46. I am being compensated at my usual rate of \$900 per hour for my work in this
22 case. My opinions are based on information available to me at this time, and I reserve the right
23 to amend and/or supplement them.
24
25
26

27 ⁴² See Butler Report at ¶10.

1 I declare under penalty of perjury under the laws of the United States of America that
2 the foregoing is true and correct.

3 Executed on this 8th day of October, 2024 at Calistoga, California.
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9 Carol Scott, Ph.D.
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EXHIBIT 1

CAROL A. SCOTT

Anderson Graduate School of Management
University of California
Los Angeles, California 90024
(310) 825-4458
(310) 206-2019 (fax)

1834 Park Blvd.
Palo Alto, CA 94306
(650) 473-9297
(650) 473-9298 (fax)

EDUCATION

Ph. D. Northwestern University, June 1975
Major Field: Marketing
Minor Field: Social Psychology

M.S. Northwestern University, August 1972
Major: Management

B.S. University of Texas at Austin, December 1970
Major: Business and history education
Graduated with highest honors

TEACHING EXPERIENCE

1977 - present **University of California, Los Angeles**
2011- Professor Emeritus of Marketing
1989-2011 Professor of Marketing
1980-89 Associate Professor of Marketing
1979-80 Acting Associate Professor of Marketing
1978-79 Assistant Professor of Marketing
1977-78 Visiting Assistant Professor of Marketing
(on leave from The Ohio State University)

2009 **Stanford University**
Visiting Professor of Marketing

1985 - 1986 **Harvard Business School**
Visiting Associate Professor, Business Administration

1974 - 1978 **The Ohio State University**
Assistant Professor of Marketing

ACADEMIC ADMINISTRATIVE EXPERIENCE

- 1990 - 94 Chairman of the Faculty, Department (School) of Management
Responsible for all matters pertaining to the approximately
100 faculty FTE in the Anderson Graduate School of Management,
a single department school, including: recruiting, retention,
promotions, salary adjustments, scheduling and staffing of courses,
and student and peer evaluation of teaching. Manage budget and
process all appointments for temporary faculty.
- 1987 - 91 Associate Dean, Academic Affairs
1993 - 94 Act for the dean in his absence. Responsible for all academic
degree programs and support services including: full-time, Fully
Employed and Executive MBA Programs, Ph.D. and M.S.
Programs, Management Communications Program, Management
Field Studies Office, Computing Services Center, and all
interdisciplinary study centers (e.g., Entrepreneurial Studies
Center, Finance and Real Estate, International Business, etc.).
- 1986 - 87 Assistant Dean, MBA Curriculum & Policy
Responsible for all academic policies pertaining to the full-time
MBA Program. Coordinated a review of this program which
resulted in revised core curriculum; implemented computerized
bidding system for course enrollment.

JOURNAL ARTICLES PUBLISHED

- Robert A. Hansen and Carol A. Scott. Comments on attribution theory and advertiser
credibility. *Journal of Marketing Research*, 13, May 1976.
- Carol A. Scott. Effects of trial and incentives on repeat purchase behavior. *Journal of
Marketing Research*, 13, August 1976.
- Carol A. Scott. Modifying socially-conscious behavior: The foot-in-the-door technique.
Journal of Consumer Research, 4, December 1977.
- Carol A. Scott and Richard F. Yalch. A test of the self-perception explanation of the
effects of rewards on intrinsic interest. *Journal of Experimental Social
Psychology*, 14, January, 1978.
- Carol A. Scott and Richard F. Yalch. Consumer response to initial product trial: A
Bayesian analysis. *Journal of Consumer Research*, 7, June 1980.

Alice M. Tybout and Carol A. Scott. Availability of well-defined internal knowledge and the attitude formation process: Information aggregation versus self-perception. *Journal of Personality and Social Psychology*, 44, March 1983.

Deborah Roedder John, Carol A. Scott, and James R. Bettman. Sampling data for covariation assessment: The effect of prior beliefs on search patterns. *Journal of Consumer Research*, 13, June 1986.

James R. Bettman, Deborah Roedder John, and Carol A. Scott. Covariation assessment by consumers. *Journal of Consumer Research*, 13, December, 1986.

James R. Bettman, Elizabeth H. Creyer, Deborah Roedder John, and Carol A. Scott. Covariation assessment in rank order data. *Behavioral Decision Making*, 1, October-December, 1988, 239-254.

Aimee Drolet, Loraine Lau-Gesk, and Carol A. Scott. The Influence of Aging on Preferences for Sequences of Mixed Affective Events. *Journal of Behavioral Decision Making*, forthcoming.

Li Jiang, Aimee Drolet, and Carol A. Scott. Countering Embarrassment-Avoidance by Taking an Observer's Perspective. *Motivation and Emotion*, forthcoming.

REPORTS, PRESENTATIONS, CHAPTERS IN BOOKS

Carol A. Scott, Decade of the Executive Woman, New York: Korn/Ferry, International, 1993.

Vicky L. Crittenden, Carol A. Scott, and Rowland T. Moriarty. The effects of prior product experience on organizational buying behavior. In Paul Anderson and Melanie Wallendorf (eds.) *Advances In Consumer Research*, vol. 14, 1986.

James R. Bettman, Deborah Roedder, and Carol A. Scott. Consumers' assessment of covariation. In T. Kinnear (ed.), *Advances In Consumer Research*, vol. 11, 1983.

Carol A. Scott and Alice M. Tybout. Some indirect effects of case vs. base rate data on information processing strategies. In R. Bagozzi and A. M. Tybout (eds.), *Advances in Consumer Research*, 10, Association for Consumer Research, 1982. (Abstract).

Carol A. Scott. On using attribution theory to understand advertising effects. In A. Mitchell (ed), *Advances in Consumer Research*, 9, Association for Consumer Research, 1981.

Carol A. Scott and Alice M. Tybout. Theoretical perspectives on the impact of negative information: Does valence matter? Abstract published in K. Monroe (ed.), *Advances in Consumer Research*, 8, Association for Consumer Research, 1980

- Carol A. Scott. Consumer satisfaction: Perspectives from self-perception theory. Paper presented at the American Psychological Association conference, Montreal, Canada, September, 1980.
- Carol A. Scott. Forming beliefs from experience: Evidence from self-perception theory. In H. H. Kassarian and T. S. Robertson (eds.), *Perspectives In Consumer Behavior*, 3rd edition, Scott, Foresman, 1981.
- Alice M. Tybout and Carol A. Scott. Extending the self-perception explanation: The effect of cue salience on behavior. In W. L. Wilkie (ed.), *Advances in Consumer Research*, 6, Association for Consumer Research, 1979.
- Carol A. Scott. Attribution theory in consumer research: Scope, issues, and contributions. Proceedings, American Marketing Association Fall Educators' Conference, S. Jain (ed.), 1978.
- Carol A. Scott. The role of self-perception processes in consumer behavior: Interpreting one's own experiences. In Keith Hunt (ed.), *Advances in Consumer Research*, 5, Association for Consumer Research.
- Robert A. Hansen and Carol A. Scott. Alternative approaches to assessing the quality of self-report data. In Keith Hunt (ed.), *Advances in Consumer Research*, 5, Association for Consumer Research, 1978.
- Robert A. Hansen and Carol A. Scott. Improving the representativeness of survey research: Some issues and unanswered questions. Proceedings, American Marketing Association Fall Educators' Conference, 1977.
- Richard F. Yalch and Carol A. Scott. Effect of initial trial of a new product on attitude-behavior consistency. In W. D. Perreault, Jr. (ed.), *Advances in Consumer Research*, 4, Association for Consumer Research, 1977.
- Carol A. Scott, Researching the broadened concept of consumer behavior. In G. Zaltman and B. Sternthal (eds.), *Broadening the Concept of Consumer Behavior*. Association for Consumer Research monograph, 1975.
- Brian Sternthal, Carol A. Scott, and Ruby Roy. Self-perception as a means of personal influence: The foot-in-the-door technique. In B. Anderson (ed.), *Advances in Consumer Research*, 3, Association for Consumer Research, 1975.
- Carol A. Scott. Hendley distributors. Consumer behavior research case in Gerald Zaltman, Philip C. Burger, and Randall L. Schultz, *Cases in Marketing Research*, New York: Dryden Press, 1975.

AWARDS

1984 Outstanding Teacher of the Year, presented by MBA students at the Graduate School of Management, UCLA.

GRANTS RECEIVED (non-university)

New Roles for Corporate Communications. Grant received from the Marketing Science Institute (with James R. Bettman, Richard J. Lutz, and Barton A. Weitz), December 1980 - May 1981.

SELECTED PROFESSIONAL ACTIVITIES

Academic Advisory Council, Marketing Science Institute, 1987 to 1990

Editorial Boards:

Journal of Marketing Research, December 1975 to July 1985

Journal of Marketing, July 1978 to July 1986; January 1991 - August 1993

Journal of Consumer Research, December 1980 -

Occasional reviewer, Journal of Personality and Social Psychology and Journal of Applied Psychology

Distinguished lecturer at University of Pennsylvania (1978), University of Washington (1979), University of Florida (1979), Berkeley/Stanford (1980), University of California, Santa Barbara (1982)

AMA Doctoral Dissertation Competition chairperson, 1985

Treasurer, Association for Consumer Research, 1980-81

Resident Faculty Member, American Marketing Association Doctoral Consortium, 1979, 1980, 1983. Consortium speaker 1984, 1985, 1986

Program Committee, 1979 Annual Conference, Association for Consumer Research, Prof. Jerry Olson, chairman

Consulting projects for a number of profit, not-for-profit, and governmental organizations in Ohio and California. Assignments have included strategic marketing audits, development of strategic marketing plans, advertising planning consultation, marketing research analysis and interpretation, and expert witness testimony preparation. Member of the board of directors, Petco, Inc. (1989-1991), Sizzler International (1993-1999), A-Fem Medical (1995-2003), Classmates Media (2007-2010), and United Online,

Inc. (2003-2016). Co-founder of Crossfield Associates, LLC, a firm that provides expert marketing analysis for litigation as well as marketing strategy and research consulting services.

PROFESSIONAL MEMBERSHIPS

Association for Consumer Research

COURSES TAUGHT

Undergraduate (primarily at The Ohio State University)

Consumer Behavior; Advertising

Masters' (primarily at UCLA)

Consumer Behavior; Introductory Marketing; Advanced Marketing Management; Management of Distribution Channels; Global Marketing Management; Market Assessment; Marketing Strategy and Policy (Executive MBA Program)

Ph.D. (UCLA, Harvard, and Ohio State)

Consumer Behavior Theory and Research

Attribution Theory Research in Marketing

Doctoral research paper supervision

THESIS ADVISING

Chair, Ph.D. Thesis Committee 6 students

Member, Ph.D. Thesis Committee - 9 students

Member, Masters Examining Committee (Ohio State) - 3 students

RECENT COMMITTEE ASSIGNMENTS (UCLA only)

Task Force on Women at Anderson, 2001 –

University Committee on Research, 1999-2001

Chair, Faculty Grants Program

Dean Search Committee, 1997-1999

Executive Education Advisory Committee 1997 – 1999

MBA Admissions Committee 1997-99

Academic Staffing Committee 1997-98

Faculty Executive Committee, 1993 - 1997

Professional Educational Task Force (University), 1993-94

UCLA Child Care Services Advisory Board, 1990 - present; Chair, 1991 - 1993

EXHIBIT 2

Carol A. Scott
Expert Testimony During the Past Four Years*

1. Delta Air Lines, Inc. vs. Marriott International, Inc. – 2023. *Testimony in deposition (2023).*

Conduct research to determine to what extent consumers are confused as to the source or affiliation of Counterclaim Defendant’s “Delta Hotels by Marriott” brand, such that they mistakenly believe it is connected to Delta Air Lines.

2. Kewazinga Corp. vs. Google LLC – 2022. *Testimony in deposition (2022).*

Conduct research to determine whether a proposed removal of an animation effect in Google Street View would be an acceptable alternative or substitute for Google Street View that contains such an animation effect.

3. Lontex Corporation vs. Nike, Inc. – 2020-2021. *Testimony in deposition (2020) and trial (2021).*

Conduct research to determine the extent to which interest in purchasing certain NIKE apparel products is increased if those products are shown using “Cool Compression” in the product descriptions.

4. Edwards Lifesciences Corporation et al. vs. Meril Life Sciences Pvt. Ltd. *et al.* – 2021. *Testimony in deposition (2021).*

Conduct research to investigate which product claims in Defendants’ advertising for its heart valve products would be important to potential customers, and to determine potential customers’ expectations regarding any clinical research data that may have been done to support these claims.

5. Justin Lytle and Christine Musthaler vs. Nutramax Laboratories, Inc. et al. – 2021. *Testimony in deposition (2021).*

Conduct research to investigate various aspects of consumers’ decision-making processes in their purchase of Nutramax’s health supplement products for dogs. Also asked to assess the reliability and validity of Plaintiffs’ expert’s opinions regarding the importance of challenged statements that appear on the packaging of the products at issue.

6. Andrea A. Williams and James Stewart vs. Apple Inc. – 2021. *Testimony in deposition (2021).*

Conduct research to determine and analyze the decision process by which current and past users of Apple’s iCloud Service came to subscribe to iCloud for a monthly fee. Also asked to assess whether or not Plaintiffs’ expert’s conjoint study provides a valid test of the Plaintiffs’ central allegations.

7. Hubert Hansen Intellectual Property Trust *et al.* vs. The Coca-Cola Company, Monster Beverage Corporation et al. – 2019-2020. *Testimony in deposition (2019) and trial (2020).*

Rebut expert’s opinions regarding the reliability of that expert’s opinion regarding the importance of the Hubert Hansen name to the sale of Hansen’s Natural juices and

* Underlined party indicates client

Hubert's Lemonade products.

8. Kurin, Inc. vs. Magnolia Medical Technologies, Inc. – 2019. *Testimony in deposition (2019).*

Evaluate the reliability and validity of Plaintiff's expert opinion that potential customers of a blood collection product are likely to be misled by statements that the product is "registered and listed" with the FDA.

9. Anthony Belfiore vs. Proctor & Gamble Company – 2019. *Testimony in hearing (2019).*

Rebut expert's opinions regarding the reliability of that expert's regression models to determine classwide economic damages for purchasers of adult wipes containing "flushable" claims.

10. Brandi Price and Christine Chadwick vs. L'Oréal USA, Inc. *et al.* – 2019. *Testimony in deposition (2019).*

Assess the content and structure of a survey that Plaintiffs' expert conducted to perform a conjoint analysis, and thus to determine whether that data can be used to make reliable and valid predictions of consumers' preferences for Defendants' shampoo products.

11. Vivian Deveroux *et al.* vs. Apple Inc. – 2019. *Testimony in deposition (2019).*

Conduct research to evaluate consumer perceptions of Apple's request for government-issued ID during a simulation of an Apple education discount transaction.

12. Thomas Davidson *et al.* vs. Apple Inc. – 2019. *Testimony in deposition (2019).*

Determine via consumer research whether or not a disclosure of the chance of a possible touchscreen issue would affect consumers' purchase decisions about an Apple iPhone. Also asked to assess whether or not Plaintiffs' expert conducted a consumer survey in accordance with generally accepted standards of consumer research.

13. Lodestar Anstalt vs. Bacardi & Company Limited *et al.* – 2019. *Testimony in deposition (2019).*

Conduct research to determine whether a consumer study conducted by Defendants' expert provides a reliable estimate of the degree to which consumers believe that Plaintiff's products using the "Untamed" mark are made by, affiliated with, or licensed from the defendant.

14. Suzanna Bowling *et al.* vs. Johnson & Johnson and McNeil Nutritionals, LLC – 2018. *Testimony in deposition (2018).*

Conduct research to determine whether or not the "No Trans Fat" claim on packages of Benecol spread affect the likelihood that consumers would purchase the product or consumers' perceptions of health-related benefits of the product. Also investigate

and analyze the reasons why Benecol purchasers first purchased and continue to purchase the product.

15. Teresa Elward *et al.* vs. Electrolux Home Products, Inc. – 2018. *Testimony in deposition (2018).*

Evaluate the reliability and validity of methodology proposed by Plaintiffs' expert to calculate damages allegedly due to a putative class because of an alleged defect in the heating element in Frigidaire and Electrolux dishwashers.

16. Charlene Dzielak *et al.* vs. Whirlpool Corporation – 2016-2018. *Testimony in deposition (2018).*

Conduct research to determine what the Energy Star logo means to purchasers of washing machines, and whether or not there is any consistent understanding among consumers of the type and specific amount of savings they may expect to experience when purchasing a washer because it carries the Energy Star logo.

17. *In re* Dollar General Corp. Motor Oil Marketing and Sales Practices Litigation (Engaged by counsel for Plaintiffs)– 2018. *Testimony in deposition (2018).*

Conduct research to determine whether or not reasonable consumers would be misled about the suitability of Dollar General's store-branded motor oil for use in their vehicles, if such vehicles were model years 1989 or later, given DG Motor Oil labeling and placement in the store among more modern formulations of motor oil that are suitable for all vehicles.

.

EXHIBIT 3

Documents Considered

First Amended Complaint For (1) Trademark Infringement (Lanham Act, 15 U.S.C. § 1114); (2) Unfair Competition/False Designation of Origin (Lanham Act, 15 U.S.C. § 1125(a)); (3) Common Law Trademark Infringement, May 3, 2024.

Answer to Complaint and Counterclaim of Defendant City of Oakland, A Municipal Corporation, Acting By and Through Its Board of Port Commissioners (Port Of Oakland), May 9, 2024.

Expert Report of Sarah Butler, June 27, 2024

“Estimates of the Total Resident Population and Resident Population Age 18 Years and Older for the United States, Regions, States, District of Columbia, and Puerto Rico: July 1, 2023 (SCPRC-EST2023-18+POP),” United States Census Bureau.

Air Travelers in America: Key Findings of a Survey Conducted by Ipsos, 2023, A4A-Air-Travel-Survey-2023-Key-Findings.pdf

Barber, W G. & G. E. Yaquinto, “The Universe,” in Shari S. Diamond and Jere B. Swann (eds.), *Trademark and Deceptive Advertising Surveys: Law, Science, and Design, Second Edition* (Diamond and Swann 2022)

Simonson, Itamar and Ran Kivetz, “Demand Effects in Likelihood of Confusion Surveys: the Importance of Marketplace Conditions,” in Shari S. Diamond and Jere B. Swann (eds.), *Trademark and Deceptive Advertising Surveys: Law, Science, and Design, First Edition*, Chapter 11, pp. 243-259.

Allenby, Greg, Geraldine Fennell, Joel Huber, Thomas Eagle, Tim Gilbride, Dan Horsky, Jaehwan Kim, Peter Lenk, Rich Johnson, Eli Ofek, Bryan Orme, Thomas Otter, and Joan Walker, “Adjusting Choice Models to Better Predict Market Behavior,” *Marketing Letters*, vol. 16, no. 3-4, Sixth Invitational Choice Symposium, December 2005 (“Allenby et al. 2005”).

“Ex 6 Met OAK Presentation,” Port of Oakland PowerPoint file “41124 Presentation.pptx”

“Elevating the OAK brand and experience,” Nov. 22, 2022, OAK Phase 1 Findings Readout_20221103.pptx

“BAY AREA ARC BOOKING LOCATIONS,” YE 2024, Bay Area ARC Heat Maps YE 3Q2024 v4 (percentages).pptx

“BAY AREA ARC BOOKING LOCATIONS,” for year ending March 2024, Bay Area ARC Heat Maps YE 3Q2024v3.pptx

“Top 20 bay area – international markets,” Port of Oakland, Intl_markets.pptx

EXHIBIT 4

Google Flights, Captured May 28, 2024

Google

Travel

Explore

Flights

Hotels

Vacation rentals

Round trip

1

Economy

Charlotte

San Francisco, California

Wed, Sep 11

All filters

Stops

Airlines

Track prices

Sep 5 – 11

Any

Best departing flights

Ranked based on price and convenience

Prices include

5:19 PM – 7:47 PM

American

Avoids as much CO2e as 1,400 trees ab

8:15 PM – 10:41 PM

American

6:00 AM – 11:01 AM

United · Operated by Mesa Airlines DBA United Ex...

8 hr 1 min

1 stop

488 kg CO2e

\$276

6:45 PM – 11:32 PM

Delta

7 hr 47 min

1 stop

327 kg CO2e

\$276

The cheapest time to book is usually later, Jun 14–Aug 22

Prices are currently typical

View price history

San Francisco, California

San Francisco, California

San Francisco International Airport SFO

San Francisco Bay Oakland International Airport OAK

San Francisco Bay Area, California

San Francisco Mountain, Arizona

Don Edwards San Francisco Bay National Wildlife

Refuge, California

San Francisco de Macoris, Dominican Republic

San Francisco International Airport SFO

San Francisco Bay Oakland International Airport OAK

San Francisco Bay Area, California

San Francisco Mountain, Arizona

Don Edwards San Francisco Bay National Wildlife

Refuge, California

San Francisco de Macoris, Dominican Republic

San Francisco International Airport SFO

San Francisco Bay Oakland International Airport OAK

San Francisco Bay Area, California

San Francisco Mountain, Arizona

Don Edwards San Francisco Bay National Wildlife

Refuge, California

San Francisco de Macoris, Dominican Republic

2

ER-0272

Google Flights, Captured October 7, 2024

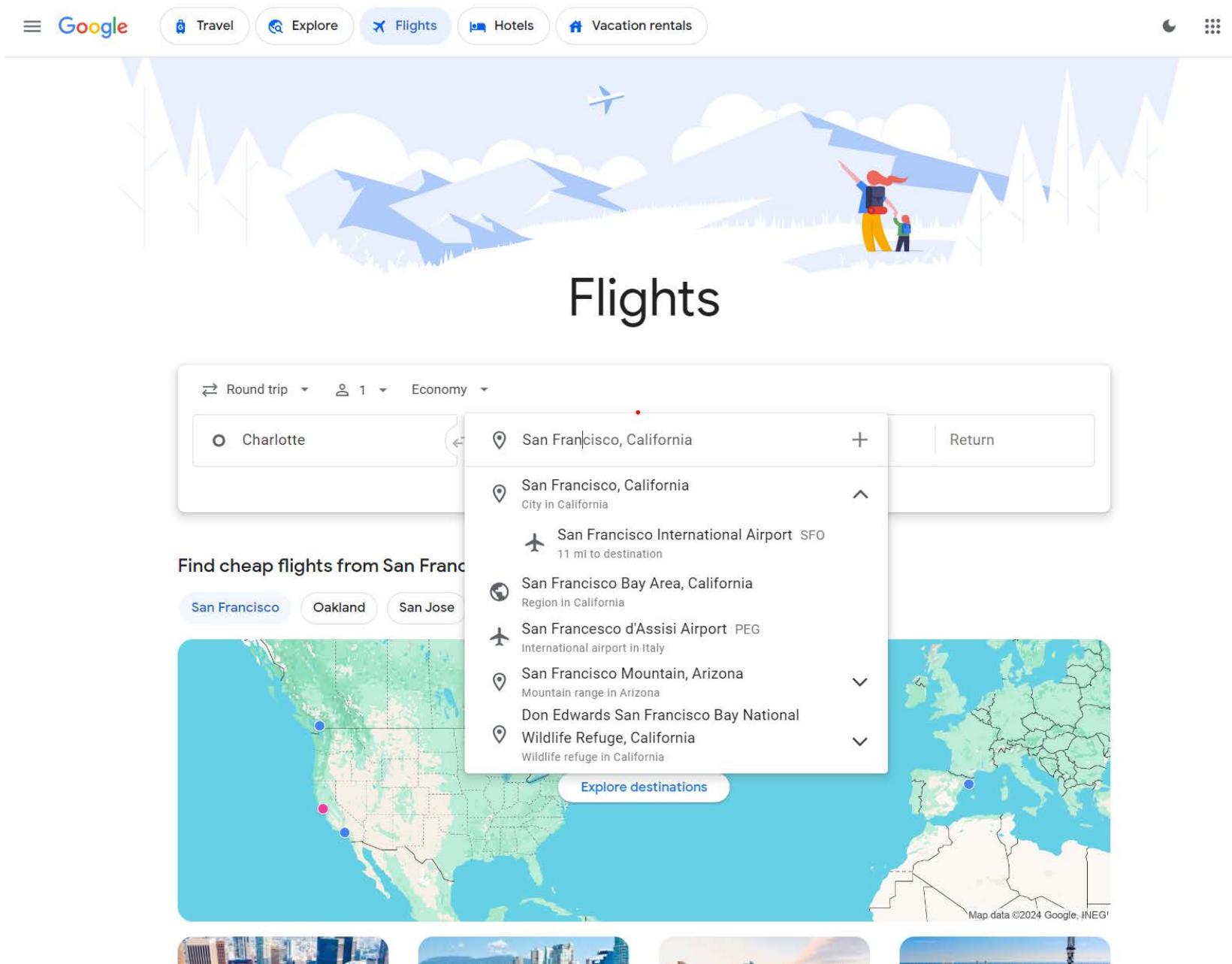





EXHIBIT 5

Alaska Airlines Website

Alaska AIRLINES 

Español Cart  Help center Sign up Sign in ▼

Book Manage Check in Where we fly Traveling with us Mileage Plan

Search 


Welcome. Let's go somewhere.

Book Check in Flight status Manage trip

Flights Hotels Cars

☐ One-way ☐ Use miles

From

Departure date 

Adults ▼

[All search options](#)
[Use discount or companion fare code](#)

To

Bay Area (All Airports)
Oakland, CA (OAK-Oakland Intl.)
San Francisco, CA (SFO-San Francisco Intl.)
San Jose, CA (SJC-San Jose Intl.)


▼

Find Flights


LIMITED TIME ONLINE OFFER


The \$0 Companion Fare has landed.


Get a \$0 Companion Fare (plus taxes and fees from \$23) and 50,000 bonus miles after qualifying purchases made with the Alaska Airlines Visa® card.




[Apply now](#) 

Must apply here for this offer. Offers vary elsewhere.







 Accessible services |  Baggage & optional fees |  Flying with REAL ID

Allegiant Airlines Website



Flight Car Destinations Travel Info ▼

Log in

Allegiant Stadium Football Fan Packages. BOOK NOW

TRAVEL ALERT

☒ Round Trip ☐ One way

From

Denver, CO (DEN)

To

San Fran

Departure Date

Departure Date

Return Date

Return Date

No destination city or airport found

Travelers

1

SEARCH

1 Seated

[Optional Services & Fees](#) | [Changed Bag Fees & Policy](#) | [10+ Travelers](#)

Delta Airlines Website

DELTA

BOOK

CHECK-IN

MY TRIPS

FLIGHT STATUS

Travel Info

SkyMiles

Need Help?

SIGN UP

LOG IN

3

JFK

To

Round Trip

Depart — Return

1 Passenger

New York-Kennedy, NY

SEARCH OPTIONS

SHOW FARES

Include Nearby Airports

SEARCH

Destination

san fran

SFO San Francisco, CA

SJC San Jose, CA

OAK Oakland, CA

flexible

Advanced Search

Meeting Code (Optional)

SEARCH

Use Certificates, eCredits, or Delta Gift Cards

Search Results

Search for topic...

Delta Phone 1(866) 494-5754 Contact Us

Hawaiian Airlines Website

✈️

Flights

🏠

Vacation Deals

🏨

Hotels

🚗

Cars

📌

Check-In

📅

My Trips

🕒

Flight Status

Roundtrip

One-Way

Multi-City

✕

Close

From

HNL

📍

▶ This field is invalid

Depart

MM/DD/YYYY

📅

Adults

Children (2-11 years of age at time of travel) ⓘ

1

▼

0

▼

☐ Flexible dates calendar

Promo Code (optional)

To

san fran

📍

✳️ San Francisco, California (SFO)

✳️ Oakland, California (OAK)

✳️ San Jose, California (SJC)

✳️ Hawaiian Airlines City

Search Flights

Search Flights & Hotels

Accessed Oct. 4, 2024

4

ER-0278

Southwest Airlines Website

Log in to view points balance

Log in

Create account

Español


Southwest

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San Francisco Area Airports

☐ San Francisco Area Airports

☐ San Francisco, CA - SFO

☐ Oakland, CA - OAK

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Recent

DEPART

ARRIVE

DEPART DATE

RETURN DATE

PASSENGERS

DAL

san fran

10/05

10/08

1

Dallas (Love Field), TX - DAL

Enter arrival airport.

Sat, Oct 5, 2024

Tue, Oct 8, 2024

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Dollars

Points

PROMO CODE (Optional)

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Round Trip ▾

1 Adult ▾

📍 **From**

Newark, NJ (EWR)

↔

📍 **To**

san fran

San Francisco Bay Area

- Oakland, CA / San Francisco, CA AREA

- San Jose, CA

All Airports (2)

OAK

SJC

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6

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Flight

Vacation Package

Cars

☒ Round trip

☐ One-way

From

Minneapolis/St. Paul

San Fran

Destinations

Oakland/San Francisco Bay, CA (OAK)
United States of America

San Francisco, CA (SFO)
United States of America

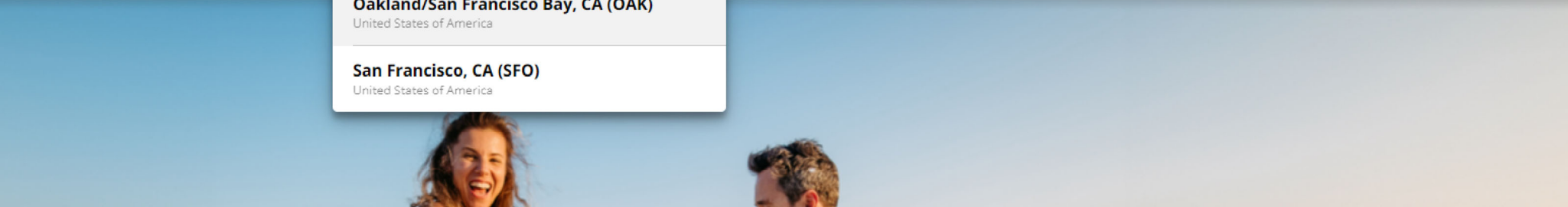
Return date

1 Traveler

→

Low Fare Map

New bag fees and opt



Mary C. Richardson (Bar No. 208586)
Port Attorney
mrichrdson@portoakland.com
Kimberly I. McIntyre (Bar No. 184648)
Deputy Port Attorney
kmcintyre@portoakland.com
PORT OF OAKLAND
530 Water Street
Oakland, California 94607
Tel: (510) 627-1572 / (510) 627-1205

Eugene M. Pak (Bar No. 168699)
epak@fennemorelaw.com
FENNEMORE WENDEL
1111 Broadway, 24th Floor
Oakland, California 94607
Tel: (510) 834-6600 / Fax: (510) 834-1928

Stephen C. Willey (Bar No. 209164)
swilley@fennemorelaw.com
Brandi B. Balanda (*Pro Hac Vice*)
bbalanda@fennemorelaw.com
Christopher J. Lindemeier (*Pro Hac Vice*)
clindemeier@fennemorelaw.com
FENNEMORE CRAIG, P.C.
1425 Fourth Avenue, Suite 800
Seattle, Washington 98101
Tel: (206) 749-0500 / Fax: (206) 749-0500

Attorneys for Defendant and Counterclaimant City of
Oakland, a municipal corporation, acting by and
through its Board of Port Commissioners (Port of
Oakland)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN
FRANCISCO,

Plaintiff,

v.

CITY OF OAKLAND AND PORT OF
OAKLAND,

Defendant.

Case No. 3:24-cv-02311-TSH

**DECLARATION OF CHRISTOPHER
LINDEMEIER**

Date: November 7, 2024
Time: 10:00 AM
Courtroom: E – 15th Floor
Trial Date: (None Set)

CITY OF OAKLAND, A MUNICIPAL
CORPORATION, ACTING BY AND
THROUGH ITS BOARD OF PORT
COMMISSIONERS (PORT OF
OAKLAND),

Counterclaimant,

v.

CITY AND COUNTY OF SAN
FRANCISCO,

Counterclaim Defendant.

I, Christopher Lindemeier, declare as follows:

1. I am over eighteen years of age and am competent to testify. I make this declaration based on personal knowledge. I am an associate attorney at Fennemore Craig, P.C., counsel for the City of Oakland, a municipal corporation, acting by and through its Board of Port Commissioners (“Port of Oakland” or “Port”), Defendant and Counterclaimant (“Defendant”) in the above-captioned matter.

2. I have reviewed the Declaration of Jessica Williams in Support of Plaintiff’s Motion for Preliminary Injunction (ECF 36) and the exhibits appended thereto (“Williams Declaration”).

3. Exhibits O through W of the Williams Declaration identify instances of alleged actual confusion, taken from social media posts or online comments, in which consumers have purportedly been confused by San Francisco Bay Oakland International Airport’s (“Airport” or “OAK”) name, as alleged by Plaintiff and Counterclaim Defendant City and County of San Francisco (the “City”).

4. In only two (2) of these instances did the post or comment suggest that actual confusion could have taken place. These two instances are included in the Williams Declaration as: (a) Exhibit O; and (b) the comment on page 4 of Exhibit U (regarding passengers who “don’t

1 speak English very well”). The other instances of alleged confusion proffered by the City did
2 not actually involve confusion and are addressed below.

3 5. The highlighted comments by a poster named Steve Olsch on August 6, 2024 on
4 the Facebook page for OAK in Exhibit P of the Williams Declaration state his personal opinion
5 that the new name is confusing, not that he was actually confused. The Facebook post states
6 “OAK is thrilled to announce that, just one month in, Viva Aerobus is expanding service from the
7 Bay Area to Monterrey, Nuevo Leon . . . Now that is how you #FlytheEastBayWay at OAK! . . .”
8 Mr. Olsch initially commented “SFO/OAK?” and another person (Dina Austin) replies “Steve
9 Olsch it’s OAKLAND AIRPORT not SF[.]” Olsch replies to Austin’s response by posting: “the
10 renaming of OAK is confusing. I think it’s SFO...” When he makes this statement on OAK’s
11 Facebook page, he could not be actually confused as Ms. Austin had already clarified “it’s
12 OAKLAND AIRPORT[.]”

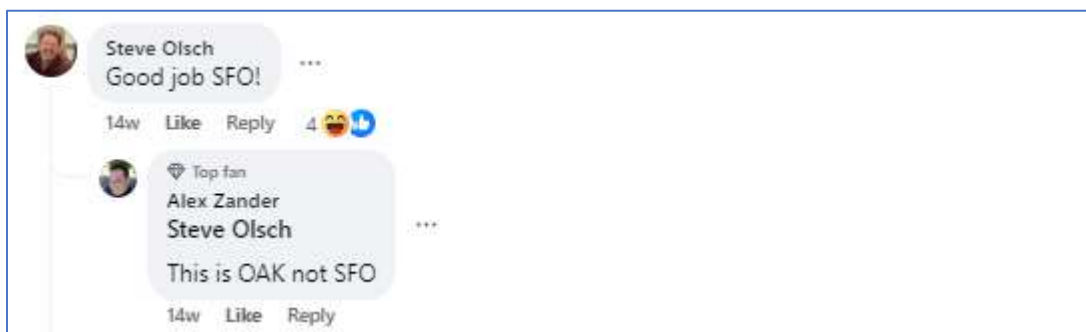
13 6. Moreover, twice *before* his August 6, 2024 comments, Mr. Olsch had already
14 been informed that “San Francisco Bay Oakland International Airport” was OAK’s new name.
15 On October 8, 2024, I reviewed OAK’s Facebook page and found multiple comments by Mr.
16 Olsch. In a comment dated May 17, 2024, about three months before his August 6, 2024
17 comment, he comments “Is that SFO?” and another person responds: “No, it’s Oakland. You’ve
18 asked that before and have been answered.” See excerpt below. The Facebook post that Olsch
19 commented on states: “New charging outlets installed in Terminal 1! Charge up your devices
20 next time you #FlyTheEastBayWay using these sleek new charging units on our new gate
21 furniture. #iflyoak.” Attached hereto as Exhibit 1 is a true and correct copy of the Facebook post
22 and Mr. Olsch’s comments from May 17, 2024, which may be found at the following web
23 address:

24 [https://www.facebook.com/iflyoak/posts/pfbid021egLv8VH2wZX5heVSYYQcwW3Va2gocX](https://www.facebook.com/iflyoak/posts/pfbid021egLv8VH2wZX5heVSYYQcwW3Va2gocXoJ8JvpR6DC1iK245Xg81SYSUgrBbDDXG8I)
25 [oJ8JvpR6DC1iK245Xg81SYSUgrBbDDXG8I](https://www.facebook.com/iflyoak/posts/pfbid021egLv8VH2wZX5heVSYYQcwW3Va2gocXoJ8JvpR6DC1iK245Xg81SYSUgrBbDDXG8I)



7. Similarly, in a June 26, 2024 post on OAK's same Facebook page stating: "*The first phase of OAK's Terminal Restroom Renovation Program has begun in Terminal 1! Our restrooms will be modernized for improved efficiency and passenger experience ...*" Mr. Olsch comments "Good Job SFO!" and is again reminded "This is OAK not SFO[.]" See excerpt below. Attached hereto as **Exhibit 2** is a true and correct copy of the Facebook post and Mr. Olsch's comments from June 26, 2024, which may be found at the following web address:

<https://www.facebook.com/iflyoak/posts/pfbid0nntAJsmFMmH4vJ71dTgMykQcME2oPUigMYNySBT5LL9iTzD1e2XySAFFjmb9LSbdl>



8. **Exhibit Q** of the Williams Declaration is a comment by a Jen Pilot on a July 19, 2024 post on OAK's same Facebook page in which she inquires if the Airport is "different" from SFO. In response to this question, another commenter replies to her (which reply comment is missing from **Exhibit Q** to the Williams Declaration) and states that "San Francisco

Bay Oakland International Airport known as ‘OAK’ is closer to UC Berkeley” as it is a 25 minute drive to UC Berkeley rather than the 39 minute drive from SFO. See excerpt below. Attached hereto as **Exhibit 3** is a true and correct copy of the July 19, 2024 Facebook post and Ms. Pilot’s comments from July 21-22, 2024, which may be found at the following web address:

<https://www.facebook.com/iflyoak/posts/pfbid0rzK61rhzXjpxSc6G3qDqMzrM6T3Gnq4VdaTSAD6zCFNzACf1GkmLhvZnY3x82ChQl>



9. Exhibit R to the Williams Declaration comprises a handful of Instagram posts, which do not include any statements of confusion or that anyone went to the “wrong” airport. The commenter on the last Instagram post states “San Francisco keeps being San Francisco” below the posted photo showing a sign for a yoga room at SFO (page 6 of Exhibit R). It is unclear why these Instagram posts were tagged with OAK’s new name, but they do not constitute instances of actual confusion.

10. The SF Gate article included as Exhibit S to the Williams Declaration either states opinions or repeats the purported instances of confusion already identified in SFO’s confusion log in Exhibit A of the Declaration of Chris Birch (ECF 38), which log is discussed in detail in the Port’s Opposition brief.

1 11. The comment in Exhibit T of the Williams Declaration by a “gruber” on the
2 Threads social media platform states the opinion of “gruber” interpreting the actions of another
3 individual whom “gruber” apparently does not know (referring to her as “a woman a few spots
4 behind me” in line). He speculates that the woman’s boarding pass, which “gruber” does not
5 indicate he actually read, confused her. There is no indication of any actual confusion caused by
6 the Airport’s name.

7 12. The first highlighted comment on the second page of Exhibit V to the Williams
8 Declaration also does not show confusion caused by the Airport’s new name. An account named
9 “n54_ftw” commented on an SF Gate article “Just dealt with this today. Someone i know is
10 flying into town tomorrow for the first time and accidentally went to sfo instead of Oakland.”
11 [sic] It is not stated why this unidentified traveler went to SFO instead of OAK. Moreover, if
12 this unnamed traveler is flying into town “tomorrow” then it is not clear how the commenter
13 could know that the traveler already “went” to SFO instead of OAK. This is further discussed in
14 the Port’s Opposition brief. The second highlighted comment on the third page of Exhibit V to
15 the Williams Declaration states that the individual was *not* confused. (“Good thing I looked at it
16 carefully before I confirmed my ride ...”)

17 13. The Williams Declaration states that Exhibit W consists of comments responding
18 to a Facebook post about the same SF Gate article and that the comments “describe[] situations
19 in which they or their friends and family were directed to the wrong airport by digital assistants
20 and rideshare apps.” But this is not the case. The first commenter does not state that she was
21 directed by any digital assistant or rideshare app to any airport, or that the commenter booked a
22 flight to or from the wrong airport. The second commenter discusses trying to look for flights
23 on Google (not a digital assistant or rideshare app) and that “Google was popping out flights from
24 SFO and Oakland” so the commenter “looked closely before booking[,]” thereby indicating that
25 the commenter was not confused at the time of purchasing a ticket. While the third commenter
26 states that she was at the “Oakland Airport 2 days ago and was confused by the name too” she
27 does not indicate that the new name confused her such that she went to the wrong airport. And

1 she does not state that she used a digital assistant or rideshare app. The fourth and final
2 commenter states that her sister left Sonoma and asked digital assistant Siri for directions to the
3 San Francisco airport and that “it started taking her to Oakland[.]” but the specific words or query
4 spoken to Siri are not identified, and the statement itself suggests that the sister was not actually
5 confused and did not go to OAK.

6 14. On October 8, 2024, I asked the Siri application on my iPhone to “give me
7 directions to the San Francisco airport from Sonoma.” Siri then gave me directions to the “San
8 Francisco International Airport[.]” Siri did not give the option of “San Francisco Bay Oakland
9 International Airport.”

10 15. I have reviewed the Declaration of Tiffany Yamasaki in Support of Defendant’s
11 Opposition to Plaintiff’s Motion for Preliminary Injunction and Exhibits 22 through 26 appended
12 thereto (“Yamasaki Declaration”). Based on the SFO Comparative Traffic Reports comprising
13 Exhibits 22 through 26 of the Yamasaki Declaration, the total number of passengers enplaned
14 and deplaned at SFO during the following months is as follows:

15	September 2023:	4,317,296
16	May 2024:	4,498,408
17	June 2024:	4,647,504
18	July 2024:	4,980,094
19	August 2024:	4,851,557

20 16. As of the date of this declaration, SFO’s Comparative Traffic Report for
21 September 2024 has not yet been posted. Accordingly, in my calculations herein, I rely on SFO’s
22 September 2023 Comparative Traffic Report to estimate the total number of enplaned and
23 deplaned passengers at SFO during September 2024.

24 17. While OAK’s new name became effective on May 9, 2024, in my calculations
25 herein I have cut in half the total number of passengers enplaned and deplaned at SFO during
26 May 2024 to provide a conservative estimate (i.e., erring on the lower side) of the total number
27

1 of passengers enplaned and deplaned at SFO from May 9, 2024 through May 31, 2024,
2 amounting to 2,249,204 passengers.

3 18. The sum of the number of passengers enplaned and deplaned at SFO during June,
4 July, and August 2024 is 14,479,155. Combined with the estimated total number of passengers
5 enplaned and deplaned at SFO from May 9, 2024 through May 31, 2024 (2,249,204) and during
6 September 2023 (4,317,296), the estimated total number of passengers enplaned and deplaned at
7 SFO from the point of OAK's name change through September 30, 2024 equals 21,045,655.

8 19. This means that the two (2) alleged instances of actual confusion proffered by the
9 City constitutes 0.0000095% of the estimated total number of passengers enplaned and deplaned
10 at SFO from the point of OAK's name change through September 30, 2024.

11 20. Assuming *arguendo* that the City's confusion log is reliable evidence of actual
12 confusion, the number of instances of actual confusion increases to seventeen (17), which
13 constitutes 0.0000808% of the estimated total number of passengers enplaned and deplaned at
14 SFO from the point of OAK's name change through September 30, 2024.

15 21. Attached hereto as **Exhibit 4** is a true and correct copy of an SFO press release
16 titled "SFO Applauds New United Airlines Service to Belize", dated June 28, 2024, which may
17 be found at the following web address:

18 [https://www.flysfo.com/about/media/press-releases/sfo-applauds-new-united-airlines-service-](https://www.flysfo.com/about/media/press-releases/sfo-applauds-new-united-airlines-service-belize)
19 [belize](https://www.flysfo.com/about/media/press-releases/sfo-applauds-new-united-airlines-service-belize)

20 22. Attached hereto as **Exhibit 5** is a true and correct copy of an SFO press release
21 titled "SFO Celebrates Alaska Airlines Announcement of Nonstop Service to Costa Rica", dated
22 July 10, 2024, which may be found at the following web address:

23 [https://www.flysfo.com/about/media/press-releases/sfo-celebrates-alaska-airlines-](https://www.flysfo.com/about/media/press-releases/sfo-celebrates-alaska-airlines-announcement-nonstop-service-costa-rica)
24 [announcement-nonstop-service-costa-rica](https://www.flysfo.com/about/media/press-releases/sfo-celebrates-alaska-airlines-announcement-nonstop-service-costa-rica)

25 23. Attached hereto as **Exhibit 6** is a true and correct copy of an SFO press release
26 titled "SFO Celebrates New Frontier Airlines Service to Palm Springs and Vail", dated October
27 1, 2024, which may be found at the following web address:

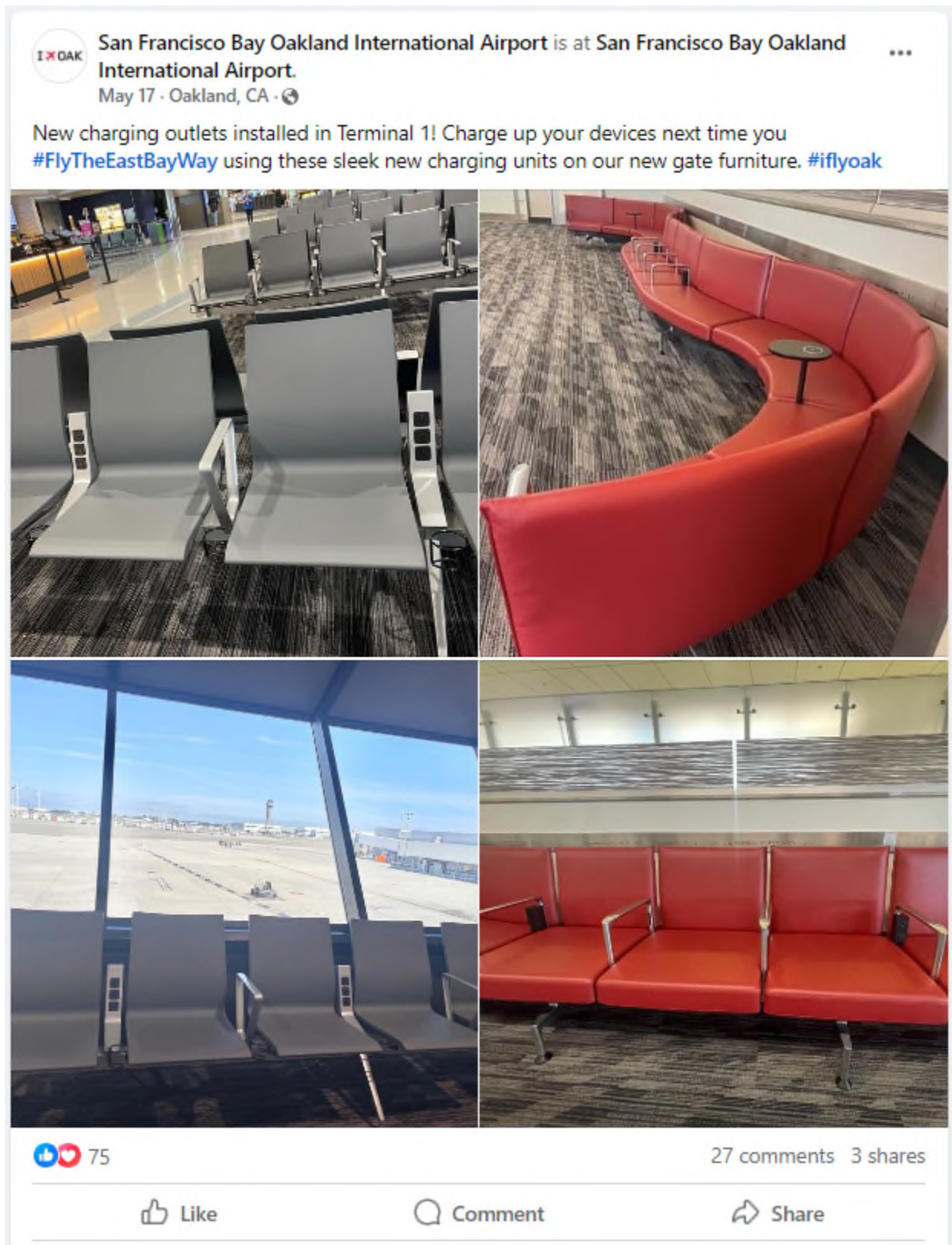
1 <https://www.flysfo.com/about/media/press-releases/sfo-celebrates-new-frontier-airlines->
2 [service-palm-springs-and-vail](https://www.flysfo.com/about/media/press-releases/sfo-celebrates-new-frontier-airlines-)

3 I declare under penalty of perjury under the laws of the United States of America that the
4 foregoing is true and correct.

5 Executed on this 8th day of October, 2024 at Seattle, Washington.

6
7 By: s/ Christopher Lindemeier
8 Christopher Lindemeier
9 Fennemore Craig, P.C.
10 1425 4th Ave., Suite 800
11 Seattle, WA 98101
12 Email: clindemeier@fennemorelaw.com
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EXHIBIT 1



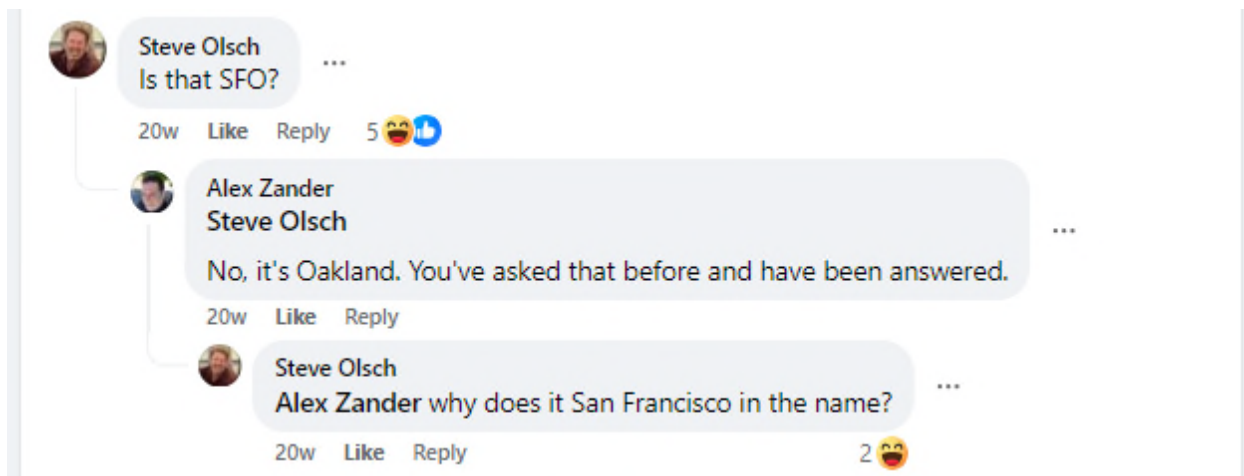






EXHIBIT 2


**San Francisco Bay Oakland International Airport** is at **San Francisco Bay Oakland International Airport.** ...
June 26 · Oakland, CA · 🌐


The first phase of OAK's Terminal Restroom Renovation Program has begun in Terminal 1! Our restrooms will be modernized for improved efficiency and passenger experience, and gender-neutral facilities and a lactation suite will be added, too! [#iflyoak](#) [#flytheeastbayway](#)





 24

15 comments 2 shares

 Like

 Comment

 Share

**Steve Olsch** ...
Good job SFO!
14w Like Reply 4 🤔👍


**Alex Zander**
Steve Olsch ...
This is OAK not SFO
14w Like Reply

EXHIBIT 3



San Francisco Bay Oakland International Airport is at San Francisco Bay Oakland International Airport.

July 19 · Oakland, CA · 🌐

Congratulations to Volaris, celebrating 15 years at OAK! OAK and LAX were the first US destinations starting with Guadalajara. Today, they are OAK's top international carrier serving 5 destinations in Mexico and El Salvador with up to 6 daily flights. #Volaris





 220

35 comments 8 shares

 Like  Comment  Share



Jen Pilot

Hi, I have a travel question. Is this Airport different from "San Francisco International Airport?" Trying to book a flight in closer to UC Berkley from L.A. but only the above comes up. Grateful any guidance. Cheers. (I'm in Australia)

11w Like Reply



Sal Godoy

Jen Pilot yes, San Francisco Bay Oakland International Airport known as "OAK" is closer to UC Berkeley and that is a 25 minute drive. At SFO that is a 39 minute drive. So OAK is the closet airport and you don't need to cross two bridges to head to Berkeley like SFO. If you need to take public transportation from OAK to UC Berkeley, take BART using the people-mover system just in front of Terminal 1 at OAK. You get to your destination much quicker using this airport. OAK is easier and convenient when you want to get out of the airport fast to get to your destination. Including less fog delays unlike SFO. OAK is your choice.

11w Like Reply Edited



Jen Pilot

Sal Godoy thank you. Excellent clarity & advice. Have a lovely day. Cheers. 🍷

11w Like Reply

EXHIBIT 4

Immediate Release

SFO Applauds New United Airlines Service to Belize

This content has not been updated in more than 90 days and may be outdated. Last edited: July 2nd, 2024.

📅 June 28, 2024 San Francisco

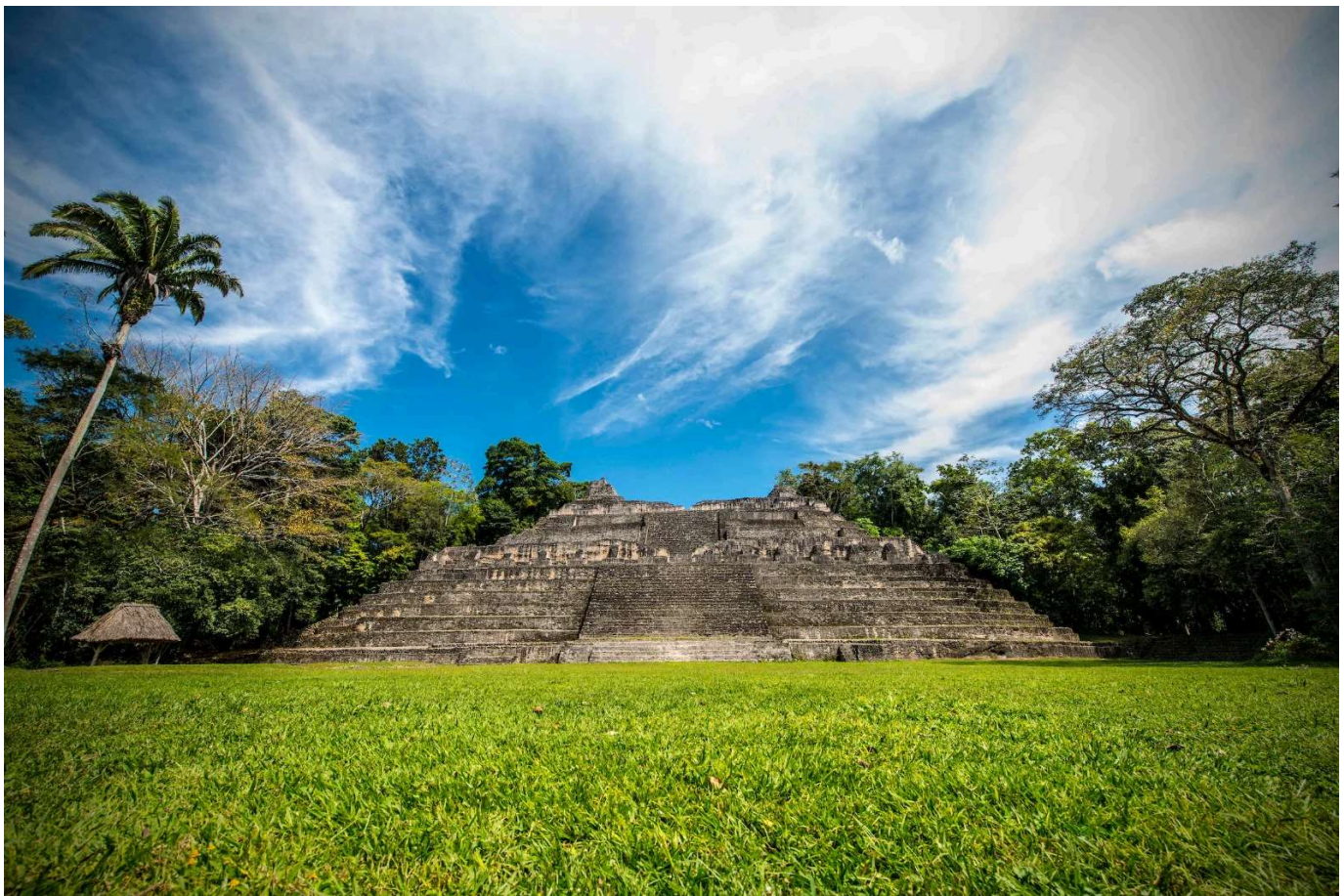


SF-24-25

SFO Applauds New United Airlines Service to Belize

Largest airline at SFO to launch seasonal service to Belize City

ER-0300



SAN FRANCISCO – June 28, 2024 – The San Francisco International Airport (SFO) celebrated an announcement today from the Belize Tourism Board detailing plans for United Airlines to launch seasonal nonstop service from SFO to Belize City, Belize starting December 21, 2024. The Airport’s largest airline plans to offer one flight per week using Boeing 737 aircraft.

“We are excited to welcome nonstop United Airlines flights from SFO to Belize,” said Airport Director Ivar C. Satero. “For Bay Area travelers seeking a warm-weather getaway this winter, United’s new service will be a welcome addition to their wide range of destinations from SFO. We thank United for their commitment to SFO and are confident this new service will be a success.”

About San Francisco International Airport

SFO is committed to providing an extraordinary airport experience, with seamless access, thoughtful amenities, sustainable design and inspiring artwork and exhibits.

For up-to-the-minute departure and arrival information, airport maps and details on shopping, dining, cultural exhibitions, ground transportation and more, visit www.flysfo.com. Follow us on x.com/flysfo and facebook.com/flysfo.

Contact the Public Information Officer

Doug Yakel

Public Information Officer

External Affairs Office

San Francisco International Airport

[650.821.4000](tel:650.821.4000) Doug.Yakel@flysfo.com

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EXHIBIT 5

Immediate Release

SFO Celebrates Alaska Airlines Announcement of Nonstop Service to Costa Rica

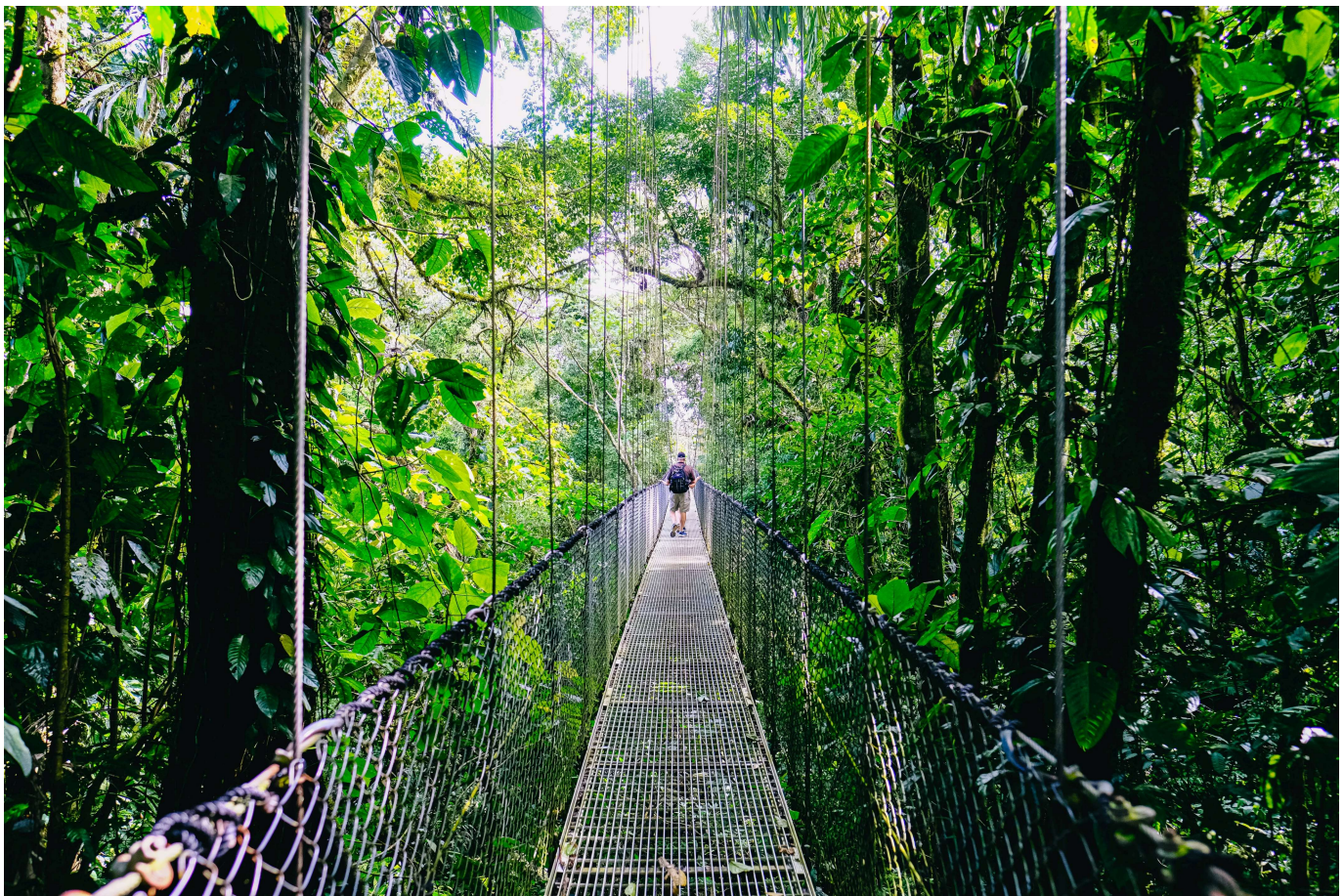
This content has not been updated in more than 90 days and may be
outdated. Last edited: July 10th, 2024.

📅 July 10, 2024 San Francisco



SFO Celebrates Alaska Airlines Announcement of Nonstop Service to Costa Rica

*Airline plans to launch nonstop flights to Liberia in
December 2024*



SAN FRANCISCO – July 10, 2024 – The San Francisco International Airport (SFO) celebrated an announcement today from Alaska Airlines detailing plans to launch seasonal nonstop service from SFO to Liberia, Costa Rica starting December 21, 2024. Alaska plans to offer one flight per week to Daniel Oduber Quirós International Airport during the winter season using Boeing 737 aircraft.

“We are very excited to welcome nonstop Alaska Airlines flights from SFO to Costa Rica this December,” said Airport Director Ivar C. Satero. “With this new service, Alaska is giving Bay Area travelers seamless access to a fantastic new warm-weather destination. We thank Alaska for their continued commitment to SFO and are confident this seasonal service will be a great success.”

“We look forward to welcoming our guests onboard this winter on our new nonstop flight from San Francisco to Liberia, one of the most beautiful and vibrant destinations in Central America. This exciting new addition provides our guests with convenient connection to a destination we began flying to in 2015, and soon we’ll connect even more West Coast guests with Costa Rica’s Gold Coast when our service from SFO begins in December,” said Kirsten Amrine, vice president of network planning and revenue management at Alaska Airlines. “Our guests can already begin taking advantage of an enhanced and premium travel experience when flying

Alaska from SFO with our new location at Harvey Milk Terminal 1, which provides modern and innovative touches from the moment they step foot into our lobby.”

With Alaska’s nonstop service to Liberia from SFO, the airline is reaffirming its position as the largest U.S. carrier between the West Coast and Latin America.

As of June 19th, 2024, Alaska Airlines operates all SFO flights from Harvey Milk Terminal 1.

About San Francisco International Airport

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For up-to-the-minute departure and arrival information, airport maps and details on shopping, dining, cultural exhibitions, ground transportation and more, visit www.flysfo.com. Follow us on x.com/flysfo and facebook.com/flysfo

Contact the Public Information Officer

Doug Yakel

Public Information Officer

External Affairs Office

San Francisco International Airport

[650.821.4000](tel:650.821.4000) Doug.Yakel@flysfo.com

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EXHIBIT 6

Immediate Release

SFO Celebrates New Frontier Airlines Service to Palm Springs and Vail

📅 October 01, 2024 San Francisco



SFO Celebrates New Frontier Airlines Service to Palm Springs and Vail

Airline plans to add new nonstops in December 2024

SAN FRANCISCO – October 1, 2024 – The San Francisco International Airport (SFO) celebrated an announcement today from Frontier Airlines detailing plans to launch new nonstop
ER-0308

flights from SFO to Palm Springs and Vail, Colorado in December 2024. Effective December 12th, Frontier will launch three flights per week to Palm Springs, operating on Tuesdays, Thursdays, and Sundays. On December 21st, Frontier will launch one flight per week, on Saturdays, to Vail, Colorado. All flights will operate using Airbus A320 aircraft. “We are very excited to welcome Frontier Airlines’ new nonstop flights from SFO to Palm Springs and Vail this December,” said Airport Director Ivar C. Satero. “With this new service, Frontier is giving Bay Area travelers fantastic new options for sun or snow this holiday season. We thank Frontier for their continued commitment to SFO and are confident this seasonal service will be a great success.”

About San Francisco International Airport

SFO is committed to providing an extraordinary airport experience, with seamless access, thoughtful amenities, sustainable design and inspiring artwork and exhibits. For up-to-the-minute departure and arrival information, airport maps and details on shopping, dining, cultural exhibitions, ground transportation and more, visit flysfo.com. Follow us on x.com/flysfo and facebook.com/flysfo.

Contact the Public Information Officer

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